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Robert P. Mosteller

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N.C. INNOCENCE INQUIRY COMMISSION'S FIRST DECADE: IMPRESSIVE SUCCESSES AND LESSONS LEARNED*

ROBERT P. MOSTELLER**

This Article examines the North Carolina Innocence Inquiry Commission in its first decade of operation. The Commission, which was created in 2006 by the North Carolina General Assembly, is unique in the nation for its structure and charge to investigate and find cases of factual innocence among convicted felons. This Article examines the seven cases handled by the Commission where innocence has been found. In them, nine men have been freed, each after serving decades in prison, in murder and rape cases that the evidence developed by the Commission showed they did not commit. The Commission has demonstrated that its general inquisitorial model with broad access to evidence, investigative tenacity and accumulated expertise, and neutrality provide important benefits in finding and documenting evidence of innocence.

These seven cases provide fascinating examples of mistakes in the initial investigation and dogged tunnel vision that focused on finding incriminating evidence to convict the incorrectly selected prime suspect(s). The cases exhibit an abundance of false statements by informers and erroneous tips by reward seekers, erroneous forensic evidence, false confessions, and mistaken eyewitness identifications. The Commission has enjoyed cooperation from law enforcement and prosecutors, but it has also had to overcome resistance from officials defending earlier flawed investigations and prosecutions. In these seven cases, the process succeeded.

The examination of these cases and the Commission's processes show an important and successful new model for rectifying the systemic errors that evade correction through ordinary

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** J. Dickson Phillips Distinguished Professor of Law at the University of North Carolina School of Law. I wish to thank Executive Director Lindsey Guice Smith and Associate Director Sharon Stellato of the North Carolina Innocence Inquiry Commission for assistance with research and comments on an earlier draft, former Executive Director Kendra Montgomery-Blinn for help in the research, Christine Mumma for her information and insights, Rich Rosen for his advice, Daniel Mosteller for his comments, and Kirstin Gardner and Tyler Buckner for research assistance.

adversarial procedures and ultimately produce wrongful convictions. The Commission's successes and the lessons learned from its operation deserve examination by other jurisdictions dealing with the persistent failures of our criminal justice system to avoid convicting and incarcerating defendants who are factually innocent.

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INTRODUCTION

In 2006, the state legislature created the North Carolina Innocence Inquiry Commission (“Commission”), which is unique in the nation for its structure and charge to investigate and find cases of factual innocence among convicted felons. This Article is an examination of the Commission’s work as it approaches the end of a decade in operation. The seven cases where innocence has been found provide a substantial body of material to evaluate.¹ In them,

1. By the close of 2015, the Commission had held nine hearings. In addition, its work in the *Brown & McCollum* and *McInnis* cases are included even though the hearings in those cases were held as part of a post-conviction motion, which in North Carolina is

nine men have been freed, each after serving decades in prison, in murder and rape cases that the evidence showed they did not commit. The Commission has demonstrated that its general inquisitorial model with broad access to evidence, investigative tenacity and accumulated expertise, and neutrality as an investigative body provide important benefits in finding and documenting evidence of innocence.

These seven cases provide fascinating examples of mistakes in the initial investigation and dogged tunnel vision that focused on finding incriminating evidence to convict the incorrectly selected

denominated a Motion for Appropriate Relief. The Commission has found sufficient evidence to merit judicial review in seven of its nine cases that proceeded to hearing. The most recent case of Knolly Brown, a guilty plea case in which the Commission voted unanimously in favor of review late in 2015, is not included because the three-judge panel's decision was not made until May 27, 2016, when this Article was approaching publication. At the end of the three-judge hearing, Brown moved for a finding of innocence and declaration of exoneration, the prosecutor joined in the motion, and the three-judge panel unanimously declared his innocence. *See Three-Judge Panel at 3, State v. Brown*, 08-CRS-50309 (N.C. Super. Ct. June 13, 2016), <http://www.innocencecommission-nc.gov/Forms/pdf/knolly-brown/three-judge-panel-opinion-state-vs-knolly-brown.pdf> [<https://perma.cc/T7PA-FYBD>]. Despite the Knolly Brown exoneration, which is the eighth, this Article refers to seven fully analyzed cases.

In addition to the five cases considered here where the three-judge panels exonerated the defendants, the Commission found by a majority vote on December 14, 2007 that there was sufficient evidence to warrant review in the Henry Reeves case. *See State v. Reeves*, 99-CRS-65056, at 2 (N.C. Innocence Inquiry Comm'n Dec. 18, 2007), <http://www.innocencecommission-nc.gov/Forms/pdf/Reeves/NCIIC%20Opinion%20-%20Reeves.pdf> [<https://perma.cc/JHT8-HJEK>]. However, the three-judge panel in that case unanimously found that Reeves did not establish innocence by clear and convincing evidence on September 3, 2008, and denied relief. *State v. Reeves*, 99-CRS-65056 (N.C. Super. Ct. Sept. 3, 2008), <http://www.innocencecommission-nc.gov/Forms/pdf/Reeves/OpinionReeves.pdf> [<https://perma.cc/UP7B-Z9V3>].

In the Terry McNeil case, the commissioners unanimously voted that there was not sufficient evidence of innocence to warrant judicial review at the end of its one-day hearing on January 16, 2009, and they closed the case. *State v. McNeil*, 00-CRS-57073-74, at 2 (N.C. Innocence Inquiry Comm'n Jan. 16, 2009), <http://www.innocencecommission-nc.gov/Forms/pdf/McNeil/OpinionMcNeil.pdf> [<https://perma.cc/9C6H-QW48>]. In the Teddy Isbell, Damian Mills, and Larry Williams, Jr. cases, after a three-day hearing, the commissioners were not unanimous in finding sufficient evidence to warrant judicial review as required when the claimants entered guilty pleas and issued opinions closing these cases on December 18, 2013. *See State v. Isbell*, 03-CRS-93, at 2 (N.C. Super. Ct. Dec. 18, 2013); *State v. Mills*, 00-CRS-65084, at 2 (N.C. Super. Ct. Dec. 18, 2013); *State v. Williams*, 00-CRS-65085, at 2 (N.C. Super. Ct. Dec. 18, 2013), <http://www.innocencecommission-nc.gov/isbell.html> [<https://perma.cc/T4KT-ZWK2>] (containing all three cases within this link).

These eleven cases represent only a tiny percentage of the claims the Commission receives. As of December 2015, the Commission, which began operation in 2007, has received 1,837 claims, and it has closed 1,724 of them. *See NC Innocence Inquiry Commission Case Statistics*, N.C. INNOCENCE INQUIRY COMMISSION, <http://www.innocencecommission-nc.gov/stats.html> [<https://perma.cc/24MK-ATJN>].

prime suspect(s). They exhibit an abundance of false statements by informers and erroneous tips by reward seekers, erroneous forensic evidence, false confessions, and mistaken eyewitness identifications. The Commission has enjoyed cooperation from law enforcement and prosecutors, but it has also had to overcome resistance by officials defending earlier flawed investigations and prosecutions.

In several of the cases, the past conduct or specific circumstances of the men who were wrongfully convicted made them obvious suspects (*Taylor* and *Sledge*). However, a number of the others had only minor criminal records and were the victims of erroneous tips or law enforcement hunches, which were compounded by the generation of false confessions, mistaken eyewitness identification, and questionable forensic evidence (*Grimes* and *Womble*). The mental disabilities of the suspects in three of the cases played a significant role in their wrongful conviction (*Womble*, *McCollum & Brown*, and *McInnis*). In one of the cases, multiple defendants pled guilty to crimes they did not commit after apparently losing hope of obtaining a just outcome at trial (*Kagonyera & Wilcoxson*). The guilty plea in another case is largely inexplicable (*McInnis*). In a number of these cases, the Commission's forensic testing of physical evidence contributed to the exoneration (*Taylor*, *Kagonyera & Wilcoxson*, *Sledge*, and *McInnis*). In several, it pointed to the actual perpetrators (*Grimes*, *McCollum & Brown*). However, as the Commission's statute authorizes, innocence was also found in cases without any exonerating forensic evidence, let alone dispositive DNA evidence of innocence.

The Commission's statutory structure was the product of a series of compromises between various players in the criminal justice system. Whether that structure was workable or would doom the Commission to failure was unknown when it commenced operation. Obviously, the Commission's successes do not prove that its current structure is optimal, but its structure does work. Members of law enforcement, prosecutors, and victims' advocates have joined defense attorneys in typically unanimous votes that "there is sufficient evidence of factual innocence to merit judicial review."² Defendants have been willing to waive their Fifth Amendment privilege against self-incrimination and attorney-client privilege, which are major protections in the adversary system, but must be abandoned before any formal inquiry into innocence can be commenced.³

2. See N.C. GEN. STAT. § 15A-1468(c) (2015).

3. *Id.* § 15A-1467(b).

Beyond the structure of the Commission, its accumulated expertise and the manner of operation of its staff have played a large role in its successes. Over the years of work with law enforcement, government officials, and witnesses, the Commission and its staff have exhibited a thorough, unflinching neutral approach to finding and analyzing evidence to determine innocence or confirm guilt. The structure proved workable, but it did not ensure the success that the Commission has enjoyed. Committed professionals exercising judgment and some fortuity have been important as well.

This Article shows the value that the Commission has added to the integrity of the North Carolina criminal justice process in its willingness to investigate and resolve substantial claims of innocence among those convicted of serious crimes. The Article also concerns the value of the Commission structure. This Article supports these propositions by presenting detailed analyses of the defendants' innocence demonstrated in the Commission's cases. Making these stories accessible, along with thorough documentation, is much of the goal.⁴

This Article proceeds in three parts. Part I discusses the origins and the key elements of the Commission's unique design. Part II, which forms the core of this Article, discusses the seven cases in which the Commission's work resulted in exoneration.⁵ These cases

4. Excessive footnotes is a proper criticism of law review articles. This Article has, what is by any reasonable gauge, an extraordinary number. The justification for this is straightforward. Deciding that a convicted defendant is innocent should be met with some skepticism and this claim, as well as the claim that the criminal justice system so malfunctioned, should be verified with concrete evidence.

5. In five of these cases (*Sledge*, *Womble*, *Grimes*, *Kagonyera & Wilcoxson*, and *Taylor*), the Commission found sufficient evidence of factual innocence to recommend review by a three-judge panel. *State v. Sledge*, 78-CRS-2415-2416, at 2 (N.C. Innocence Inquiry Comm'n Dec. 5, 2014), <http://www.innocencecommission-nc.gov/Forms/pdf/Sledge/Commission%20Opinion.pdf> [https://perma.cc/SSV2-D9F8]; *State v. Womble*, 75-CRS-6128, at 2 (N.C. Innocence Inquiry Comm'n June 3, 2014), <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/Womble%20Commission%20Opinion%20stamped.pdf> [https://perma.cc/WTX9-TBX7]; *State v. Grimes*, 87-CRS 13541, 87-CRS-13542, 87-CRS-13544, at 2 (N.C. Innocence Inquiry Comm'n Apr. 4, 2012), <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Grimes%20Opinion.pdf> [https://perma.cc/AU2F-SKXM]; *State v. Kagonyera*, 00-CRS-65086, at 3 (N.C. Innocence Inquiry Comm'n Apr. 29, 2011), <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Commission%20Opinion.pdf> [https://perma.cc/L6KM-EQZ7]; *State v. Taylor*, 91-CRS-71728, at 2 (N.C. Innocence Inquiry Comm'n Sept. 4, 2009), <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/OpinionTaylor.pdf> [https://perma.cc/26XJ-M297]. In these cases, the judges found factual innocence by clear and convincing evidence. *State v. Sledge*, 78-CRS-2415, 78-CRS-2416, at 2 (N.C. Super. Ct. Jan. 23, 2015), <http://www.innocencecommission-nc.gov/Forms/pdf/Sledge/three-judge-panel-opinion-state-vs-sledge.pdf> [https://perma.cc/KRT4-KBTY]; *State v. Womble*, 75-CRS-6128, at 2 (N.C. Super. Ct. Oct. 17, 2014),

provide raw material for analysis of the important elements of the Commission's structure and operation that made it successful in correcting errors of the North Carolina justice system. Part III links these cases to the body of modern exonerations and the Commission's efforts to the overall innocence movement. It also summarizes lessons drawn from the cases regarding the importance of particular elements of the Commission's unique structure in establishing innocence and notes its challenges and limitations. A brief conclusion follows.

I. ORIGINS OF THE COMMISSION AND KEY ELEMENTS OF ITS UNIQUE DESIGN

A. *The Process of Creating the Innocence Inquiry Commission*

The Innocence Inquiry Commission has its origins in an initiative by former Supreme Court of North Carolina Chief Justice I. Beverly Lake, Jr.⁶ In November 2002, Chief Justice Lake assembled a group of approximately thirty who represented various elements of the criminal justice community and legal academia.⁷ They formed the

<http://www.innocencecommission-nc.gov/Forms/pdf/Womble/Three%20Judge%20Panel%20Opinion%20-%20State%20v.%20Womble.pdf> [https://perma.cc/8J8N-S8DM]; State v. Grimes, 87-CRS-13541, 87-CRS-13542, 87-CRS-13544, at 2 (N.C. Super. Ct. Oct. 5, 2012), <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Grimes.%20Willie%20-%20Decision%20of%20the%20Three-Judge%20Panel%20Pursuant.pdf> [https://perma.cc/UGP4-86BK]; State v. Kagonyera, 00-CRS-65086, at 2 (N.C. Super. Ct. Sept. 22, 2011), <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Opinion%20Kagonyera.pdf> [https://perma.cc/ER95-WJC8]; State v. Taylor, 91-CRS-71728, at 2 (N.C. Super. Ct. Feb. 17, 2010), <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/Taylor%203%20judge%20panel%20decision.pdf> [https://perma.cc/956B-8DXY]. In two others, *McCollum & Brown* and *McInnis*, the work of the Commission's investigation was presented in an already-scheduled post-conviction relief hearing before a single judge. See State v. McInnis, 88-CRS-1422, at 1 (N.C. Super. Ct. Aug. 10, 2015), <http://www.innocencecommission-nc.gov/Forms/pdf/McInnis/Order%20and%20Dismissal.pdf> [https://perma.cc/QEA3-Y7TV]; State v. McCollum, 83-CRS-15506, 83-CRS-15507, at 4 (N.C. Super. Ct. Sept. 2, 2014), <http://www.innocencecommission-nc.gov/Forms/pdf/McCollum-Brown/Postconviction%20Opinion%20-%20State%20v.%20McCollum%20and%20Brown.pdf> [https://perma.cc/97C2-6V9E].

6. See Eli Hager, *A One-Man Justice Crusade in North Carolina*, MARSHALL PROJECT (July 29, 2015, 5:21 PM), <https://www.themarshallproject.org/2015/07/29/a-one-man-justice-crusade-in-north-carolina> [https://perma.cc/23QK-MKJ4] (describing Justice Lake's central role in creating the Commission).

7. Christine C. Mumma, *The North Carolina Innocence Inquiry Commission: Catching Cases that Fall Through the Cracks*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 249, 250 (Marvin Zalman & Julia Carrano eds., 2014) [hereinafter Mumma, *Catching Cases*].

North Carolina Actual Innocence Commission, which ultimately proposed the creation of the Innocence Inquiry Commission.⁸

The primary objective of the Actual Innocence Commission (“AIC”) was to make recommendations to reduce wrongful convictions of the innocent.⁹ The group established a broad set of objectives designed to identify the most frequent causes of wrongful convictions and develop solutions,¹⁰ choosing first to concentrate on the problems leading to mistaken eyewitness identification because of the prevalence of such mistakes in DNA exoneration cases. Their work produced an important set of recommendations to law enforcement for conducting eyewitness identification procedures.¹¹

After discussion of recording interrogations, the AIC next turned its attention to procedures for post-conviction review of claims of innocence.¹² Although the AIC initially considered modifying the state post-conviction processes to review actual innocence claims, it concluded that the changes would be difficult to make and insufficient.¹³ Instead, it concluded that a structure, not based on an appellate or adversarial model, but rather one that has elements of the inquisitorial system and provides a more efficient process would be preferable.¹⁴ It drew inspiration from the Criminal Case Review

8. See Christine C. Mumma, *North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 647–49 (2004) [hereinafter Mumma, *Uncommon Perspectives*].

9. *Id.* at 650 (quoting *North Carolina Actual Innocence Commission—Mission Statement, Objectives, and Procedures*, INNOCENCE PROJECT, https://web.archive.org/web/20040414055937/http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html [https://perma.cc/WWG5-FADU]).

10. *Id.* (quoting *North Carolina Actual Innocence Commission—Mission Statement, Objectives, and Procedures*, *supra* note 9).

11. See *id.* at 653. For a full description of recommendations, see also NORTH CAROLINA ACTUAL INNOCENCE COMMISSION RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION 1–6, <http://www.ncids.org/New%20Legal%20Resources/Eyewitness%20ID.pdf> [https://perma.cc/SX25-MQKP]. With minor modifications, these recommended procedures were ultimately written into law. See N.C. GEN. STAT. § 15A-284.52 (2015).

12. Mumma, *Uncommon Perspectives*, *supra* note 8, at 654.

13. Mumma, *Catching Cases*, *supra* note 7, at 252. Among the objections were that the Motion for Appropriate Relief (“MAR”) process is complicated and hard to amend, and it “does not adequately isolate and review valid innocence claims as a result of procedural bars.” *Id.* at 256.

14. See *id.* The initial stages of the Commission process have some inquisitorial features in that it is non-adversarial and operates neutrally, particularly in the investigative stage, which allows for more efficient examination of whether the conviction was erroneous. See *id.*

Commission of the United Kingdom, which was developed in the mid-1990s in response to high profile wrongful convictions there.¹⁵

After extended discussion and negotiation, the AIC approved draft legislation to create an innocence inquiry commission in March 2005.¹⁶ Some modifications of the proposal were made during the next year as the bill moved through the two chambers of the North Carolina General Assembly. With the governor's signature, the Innocence Inquiry Commission was formally established on August 3, 2006.¹⁷

B. Design of the Commission

The final details of the Commission's structure and procedures were the product of both the ACI proposals and legislative amendments, with each of its features and the alterations all relating to a set of basic concerns. These features and their rationale are briefly discussed below.

Factual Innocence is the Issue

In order for the Commission to accept a case, the claimant must assert complete factual innocence.¹⁸ The Commission statute does not authorize challenges to convictions on grounds other than actual innocence. Claims involving defects in the process that led to conviction, whether based on constitutional, statutory, or procedural error, do not provide a basis for relief by the Commission process.¹⁹

An Inquisitorial Agency, Charged with Identifying the Innocent, that is Neutral and Empowered, and Expected to be Efficient and Expert

The Commission is fundamentally inquisitorial rather than adversarial, and it is focused on finding convicted defendants with

15. See *id.*; see also David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1041–45 (2010) (describing the British Criminal Cases Review Commission).

16. See Mumma, *Catching Cases*, *supra* note 7, at 254–59.

17. *Id.* at 259–60; see also Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1345–46, 1346 n.7 (2007) (noting that Governor Mike Easley signed the legislation into law on August 3, 2006).

18. See N.C. GEN. STAT. § 15A-1460(1) (2015) (defining “claim of factual innocence” as requiring that the defendant be “asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted” including “any other reduced level of criminal responsibility relating to the crime”).

19. Wolitz, *supra* note 15, at 1050. For further discussion in connection with the *Kagonyera & Wilcoxson* case, see text accompanying *infra* note 242.

credible claims of actual innocence and resolving their claims. Instead of adversarial lawyers, the Commission's staff investigates cases and presents the evidence to the commissioners.²⁰ These principles lead to a number of provisions in the Commission's statute.

The Proceedings before the Commission Are Fundamentally Inquisitorial in Nature

The claimant must waive procedural safeguards and privileges related to his or her conviction and agree to cooperate and provide full disclosure to all Commission inquiries.²¹ The claimant is entitled to advice of counsel before waiving privileges and other protections. Also, when a formal inquiry commences, the claimant has the right to counsel's advice but not to an adversarial presentation to the commissioners.²²

The Commission is Neutral and Empowered

The Commission is an independent state agency, which is important in providing legitimacy and authority. It is housed for administrative purpose under the judicial branch and has a legislatively authorized mandate and budget. It is not affiliated with either the prosecution or the defense. Moreover, it has been granted broad investigative powers to subpoena documents and evidence and to demand cooperation from neutral agencies, the prosecution, and the defense.²³ While its special function in the justice system is to find innocence among those convicted of felonies, it also is charged with providing evidence of guilt to law enforcement agencies. The case discussions demonstrate commitment to providing evidence pointing

20. The defendant only has the right to be present and to be represented by counsel at the three-panel proceeding, not at the Commission hearing stage. See N.C. GEN. STAT. § 15A-1469(d) (2015).

21. *Id.* § 15A-1467(b); see also Mary Kelly Tate, *Commissioning Innocence and Restoring Confidence: The North Carolina Innocence Inquiry Commission and the Missing Deliberative Citizen*, 64 ME. L. REV. 531, 544 (2012) (noting that the Commission proceedings are "not a normative recapitulation of an American trial"); Wolitz, *supra* note 15, at 1051 ("A formal inquiry is not an adversarial proceeding. To the contrary, it is a Commission-driven fact-finding inquiry that has more in common with the 'inquisitorial approach' of Continental civil law systems than the adversarial approach of the traditional Anglo-American trial."). If at any point during the inquiry, the claimant refuses to comply with Commission requests or is otherwise uncooperative, the inquiry is terminated. § 15A-1467(g).

22. § 15A-1467(b).

23. Under its statute, the Commission has broad powers to gather evidence, to compel witness testimony, and to grant immunity and has the right to files, access to evidence, and to subject physical evidence to forensic and DNA testing. See *id.* §§ 15A-1467(d)-(f), 1468(a1), 1471; see also Wolitz, *supra* note 15, at 1074-75.

to the actual perpetrator(s) as it exonerates the wrongfully convicted.²⁴ Although uniquely focused on finding innocence, the Commission is ultimately committed to acting “in the interest of justice.”²⁵

Efficiency and Developed Expertise is Expected

Christine Mumma, who was directly involved in the Commission’s development,²⁶ observed that its founders wanted to create a system designed explicitly for innocence claims that was more efficient than the existing post-conviction petition process.²⁷ Although the development of expertise is not explicitly specified by any of the statute’s provisions, it is implicit in establishing an agency dedicated to the search for innocence. Such an agency has the ability to develop the knowledge and analytical skills it believes appropriate for this targeted factual review.²⁸ As Professor David Wolitz, who examined the structure of the Commission, observed, “[t]he Commission’s independent investigator authority coheres with the common sense intuition that a claim of factual innocence should be reviewed—at least initially—by an entity that has robust fact-finding capabilities and the potential to build up investigatory expertise.”²⁹

Eligibility Definition—Generous Treatment of New Evidence of Innocence, Prudential Limitations, and Unreviewable Discretion to Screen and Dismiss Cases

Standards for eligible claims were shaped by multiple pressures, but with a goal to minimize procedural roadblocks to the

24. See § 15A-1468(d). In the *Taylor, Kagonyera & Wilcoxson, Grimes, and Brown & McCollum* cases analyzed in Part II, the Commission found evidence of innocence of the convicted defendants and evidence pointing to the guilt of identified alternative perpetrators, and in the *Sledge* and *McInnis* cases, developed forensic evidence that pointed to no identified individual, but had the potential of such identification with additional law enforcement investigation. Open investigations are proceeding in all these cases utilizing Commission developed evidence. Conversation with Commission Executive Director Smith and Associate Director Stellato (Nov. 13, 2015) (on file with the *North Carolina Law Review*); e-mail from Sharon Stellato, Assoc. Dir., N.C. Innocence Inquiry Comm’n, to Robert P. Mosteller, J. Dickson Phillips Distinguished Professor of Law, Univ. of N.C. Sch. of Law (Nov. 18, 2015, 10:54 AM EST) (on file with the *North Carolina Law Review*).

25. This “interest of justice” commitment is true to the United Kingdom’s Criminal Case Review Commission on which the Innocence Inquiry Commission is modeled. See Mumma, *Catching Cases*, *supra* note 7, at 252.

26. See *id.* at 255–59; Mumma, *Uncommon Perspectives*, *supra* note 8, at 650–52.

27. See Mumma, *Catching Cases*, *supra* note 7, at 252.

28. Wolitz, *supra* note 15, at 1072.

29. *Id.* at 1075.

consideration of new evidence of factual innocence. Avoiding the often insurmountable limitations on claims of newly discovered evidence, which appear arbitrary when dealing with actual innocence, led to a broad and flexible definition of an eligible claim. The key provision requires only that “there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through post-conviction relief.”³⁰

The statute does not impose a requirement that the evidence must not have been discoverable earlier through “due diligence,” or a time requirement for when the evidence should have been discovered.³¹ Moreover, the claim must contain “credible, verifiable evidence of innocence,” but the statute does not restrict consideration to that particular evidence. Instead, “all relevant evidence” is to be presented to the commissioners,³² and the commissioners’ charge is to determine whether, in total, “there is sufficient factual evidence of innocence to merit judicial review.”³³

Significantly, the statute does not require innocence claims to be supported by DNA evidence or any other scientific proof of innocence.³⁴ Nor are they limited by a statute of limitations or by ordinary rules barring successive motions. Instead, claims are limited by a prohibition against basing a claim on evidence that has in fact been previously considered at trial or during a post-conviction hearing.³⁵ Conversely, having a claim of factual innocence heard by the Commission does not restrict the claimant’s other avenues of post-conviction legal redress.³⁶

30. N.C. GEN. STAT. § 15A-1460(1) (2015).

31. *Id.* For complaints about the restrictions on newly discovered evidence claims regarding the failure to exercise due diligence in earlier discovering the new evidence and the high standard of proof that focuses upon the new evidence viewed in isolation, see Mumma, *Catching Cases*, *supra* note 7, at 251–52; Maiatico, *supra* note 17, at 1350–52 (describing rigid limitations on newly discovered evidence claims in North Carolina).

32. § 15A-1468(a). See Mumma, *Catching Cases*, *supra* note 7, at 265 n.16 (noting that the “new evidence” provision only serves a “gate-keeping function” and “[f]rom that point forth, there is no limitation on what evidence can be used”).

33. § 15A-1468(c).

34. Professor Wolitz suggests that this limitation was not imposed because the mission statement of the Actual Innocence Commission, which proposed the Innocence Inquiry Commission, defined the problem of wrongful convictions with reference both to exonerations without DNA evidence as well as exonerations through DNA evidence. See Wolitz, *supra* note 15, at 1048. The Commission structure was not the product of a promulgation of statutes throughout the nation to authorize DNA testing of evidence and creating mechanisms for the review of cases where such testing established innocence. See *infra* text accompanying notes 55–61.

35. § 15A-1460(1). See Wolitz, *supra* note 15, at 1073.

36. § 15A-1470(b). As a result, unsuccessful claimants can still pursue state post-conviction relief or federal habeas claims. Mumma, *Catching Cases*, *supra* note 7, at 262.

While the Commission statute sweeps away many barriers that commonly bar substantive consideration of potentially meritorious claims, it does impose a number of limitations. These rest on prudential concerns that suggested prioritizing cases based on their seriousness and managing workload, given the realities of the Commission's resource limitations. For instance, claims are limited to North Carolina felony convictions, and they cannot be brought on behalf of deceased individuals.³⁷ The defendant need not be in custody to raise a claim, but the Commission gives priority to "cases in which the convicted person is currently incarcerated solely for the crime for which he or she claims factual innocence."³⁸

The most significant provisions allowing the Commission to control its caseload are the authorizations for it to "informally screen and dismiss a case summarily at its discretion"³⁹ and the related authorization to determine, in its discretion, whether to grant a formal inquiry regarding a claim of innocence.⁴⁰ Like all other Commission determinations and the decisions of three-judge panels, which finally adjudicate cases where the Commission finds sufficient factual evidence of innocence, these screening determinations of the Commission staff are not subject to appellate review.⁴¹

Reviewing Convictions Based on Guilty Pleas

When the proposal to create the Commission was presented to the legislature, a major point of contention was whether to permit review of convictions based on guilty pleas. The compromise ultimately reached, and added by amendments to the initial proposal, is that, while such claims may be considered, the vote of the

Claimants Isbell, Mills, and Williams, who were unsuccessful before the Commission, subsequently succeeded in having their cases dismissed through a state-court post-conviction proceeding. *See infra* text accompanying notes 302–304.

37. §§ 15A-1460(1), 1467(a) (limiting cases to those convicted in North Carolina of felonies and directing that the Commission not consider claims brought on behalf of deceased individuals).

38. *Id.* § 15A-1466(2). The Commission has apparently followed this prioritization requirement, but it has not treated it as a requirement. In the cases that arose from the murder of William Bowman in Buncombe County in 2000, which involved guilty pleas from five defendants, the Commission heard first the cases of Kenneth Kagonyera and Robert Wilcoxson, who were the only two remaining in custody. Among those two, only Wilcoxson was exclusively confined because of his conviction in the Bowman murder. The Commission later considered the cases of the other three defendants. *See infra* text accompanying notes 246–247, 302.

39. § 15A-1467(a).

40. *Id.*

41. *Id.* § 15A-1470(a).

commissioners must be unanimous to refer the claim to a three-judge panel for adjudication.⁴²

Membership of the Commission, Standards for Decision, and Adversarial Proceedings at the Final Decision Stage before a Three-Judge Panel

The composition of the commissioners who pass on the sufficiency of the claims of innocence, the decision to give final adjudicatory authority to a three-judge panel of superior court judges, and the standards of decision and voting requirements all resulted from compromises reached in creating this extraordinary and unique system. Under Commission procedures, a successful innocence claim proceeds through two stages. First through its largely inquisitorial process, the Commission determines whether there is sufficient evidence to go forward to an adjudication of factual innocence.⁴³ If the Commission supports review, the final decision is made by a three-judge panel of North Carolina superior court judges.⁴⁴ At this juncture, the adversarial process is followed with presentations by the prosecution and defense attorneys.⁴⁵ Thus, while the three-judge panel process uses adversarial procedures, the initial Commission processes under its broad remedial statute, giving the claimant “greater opportunity for investigation” and broader “access to the courts for credible claims” of innocence.⁴⁶

The Commission provides broad representation to members of the criminal justice community as well as a public member to ensure perspective and balance and to increase public confidence.⁴⁷ Its eight voting members include a superior court judge, prosecuting attorney, victim advocate, practicing criminal defense attorney, non-lawyer

42. *Id.* § 15A-1468(c); see Mumma, *Catching Cases*, *supra* note 7, at 259–60 (recounting that the version approved by the North Carolina house eliminated review for guilty plea cases and that the North Carolina senate revived the provision, but with the unanimity requirement and a delay for two years in their consideration).

43. See § 15A-1468(c).

44. *Id.* § 15A-1469(a). None of the judges may have had “substantial previous involvement in the case.” *Id.* Mumma described the AIC’s rationale for referring cases to a three-judge panel for final review as helping to spread the burden of the difficult decisions and further increasing public confidence in the outcomes. Mumma, *Catching Cases*, *supra* note 7, at 254.

45. §§ 15A-1469(c), 1469(e) (stating that the district attorney where the defendant was convicted was or his or her designee shall represent the state and establishing that counsel shall be appointed for indigent defendants).

46. See Mumma, *Catching Cases*, *supra* note 7, at 259.

47. *Id.* at 255.

public member, sheriff, and two additional members without vocational designations.⁴⁸

The standard of decision for the Commission is whether “there is sufficient evidence of factual innocence to merit judicial review.”⁴⁹ For a case that went to trial to be carried forward to the three-judge panel for adjudication, five of the eight commissioners must vote that the standard of “sufficient evidence” has been met, but as noted above, when the conviction was based on a guilty plea, the commissioners’ vote must be unanimous.⁵⁰ While the commissioners vote, the files and materials considered, and the transcript of the Commission hearing all become public records at the time of the referral to the superior court for further hearing by the three-judge panel, the proceedings of the Commission remain confidential.⁵¹

The standard of decision at the three-judge panel level is whether the convicted person has proven his or her innocence by “clear and convincing evidence” through a unanimous vote.⁵² If the panel votes unanimously that the claimant has met his or her burden, the remedy is not a new trial, but rather dismissal of the charges.⁵³

The above discussion sets out the framework under which the Commission has operated. Alternative models for finding innocence in other jurisdictions are briefly examined immediately below. Then, the Article moves to its primary task—examining the operation, critical features, and effectiveness of the Commission in the cases where it has found innocence and exonerated the wrongfully convicted.

C. Other Models for Innocence Determination

While no other state has adopted a procedure similar to North Carolina’s Innocence Inquiry Commission, states have enacted two new types of statutes to find innocence. One provides for DNA testing and procedures for granting the convicted person relief where DNA establishes innocence. Some form of DNA testing and remedy

48. § 15A-1463(a). The Chief Justice of the North Carolina Supreme Court and the Chief Judge of the North Carolina Court of Appeals share the appointing authority for the Commission on a rotating basis except for the two members without vocational designations, who are appointed by the Chief Justice. *Id.*

49. *Id.* § 15A-1468(c).

50. *Id.*

51. *Id.* § 15A-1468(e).

52. *Id.* § 15A-1469(h).

53. *Id.* Such finding entitles the claimant to state compensation without obtaining a pardon of innocence. *Id.* § 15A-1469(i).

statute exists in almost every state.⁵⁴ Another type of remedy that a number of jurisdictions recognize is a “freestanding” claim of actual innocence founded on either state constitutional law or made part of post-conviction statutes.⁵⁵

It is beyond the scope of this Article to evaluate those remedies as possible alternatives to the Commission procedure. However, some of these jurisdictions, including the District of Columbia, which is examined as a particularly interesting example, have created a statute for claims of innocence, beyond DNA,⁵⁶ that is reasonably similar in scope of coverage to the Commission’s statute.⁵⁷ The D.C. statute allows a claim of innocence as a general, freestanding ground for post-conviction relief. These claims can be based on new evidence that is not restricted to DNA, which demonstrates actual innocence whether the conviction was a result of a trial or a guilty plea,⁵⁸ and without the rigidity of traditional newly discovered evidence statutes.⁵⁹ The statute permits two different remedies. If the court

54. Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 CAL. W. L. REV. 171, 203–09, 223 & n.140 (2014) (noting that all states now provide for DNA testing and some form of relief and that almost all have eliminated time restrictions related to innocence claims, but also recognizing that many states in fact require DNA evidence in order to grant relief, which is often unavailable). See generally Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799, 805 (2011) (describing the rapid expansion of post-conviction DNA testing statutes and their inconsistencies and limitations); see also Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 355–56 (2002) (describing and bemoaning the limitations in the DNA statutes, particularly their interaction with “traditional” post-conviction remedies, which often function to deny substantive review). North Carolina has a DNA testing and a DNA relief statute. See §§ 15A-269 to 270.

55. See John M. Leventhal, *A Survey of Federal and State Courts’ Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(1)(G-1)?*, 76 ALA. L. REV. 1453, 1477–81 (2013) (describing different state approaches to freestanding claims of actual innocence); Daniel S. Medwed, *Up the River Without a Procedure: Innocence Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 658–59, 690 (2005) (noting the difficulty of litigating innocence claims through newly discovered evidence statutes for non-DNA-based claims although recognizing that some restrictions, such as the statute of limitations, have been relaxed in some jurisdictions).

56. Washington, D.C. also has a DNA relief statute. See D.C. CODE § 22-4133 (2016).

57. See *id.* § 22-4135.

58. Defendants who pled guilty must provide “the specific reason the movant pleaded guilty despite being actually innocent.” *Id.* § 22-4135(g)(1)(E).

59. While the claimant does not have to establish that the evidence could not have been discovered through due diligence in the first instance, the motion may be dismissed if the prosecution demonstrates it has been materially prejudiced by the delay, unless the claimant can show that he or she could not have raised the claim “by the exercise of reasonable diligence” before the government was prejudiced. *Id.* § 22-4135(f).

concludes that it is “more likely than not” that the claimant is actually innocent, it shall grant a new trial.⁶⁰ But if it concludes by “clear and convincing evidence” that the movant is actually innocent, it shall vacate the conviction and dismiss the charge with prejudice.⁶¹

While providing flexible relief for actual innocence similar in scope to that given to the Commission, the D.C. statute depends on the traditional adversarial model without the systemic treatment of cases, and the neutrality, investigative powers, and expertise of the Commission. The D.C. model is presented, not to criticize it, but in fact, to suggest that it might be roughly “as good as it gets” in enabling claimants to establish innocence through the adversary system. However, as the reader examines the seven cases that are presented in Part II, which were successfully handled by the Commission, the reader can appreciate the Commission’s particular contributions in the rich and complicated context of these cases. This Article makes no claim that the Commission model is the only one that can be successful, but it does assert that it is a valuable model with significant benefits that is worthy of expansion. Readers are invited, as they review the facts of the cases examined below, to consider whether other available models would have produced the defendants’ exonerations; I have doubts that most of the nine men who were wrongfully incarcerated for decades would have been exonerated but for the Commission’s work.

What follows next are the stories of how these wrongful convictions occurred and how they were corrected by the tools, particularly the access to evidence, provided to the Commission and its investigative staff.

II. THE SEVEN EXONERATION CASES

The seven cases handled by the Commission that ended in exonerations originated in four different decades—two in the 1970s (*Womble* and *Sledge*), three in the 1980s (*Grimes*, *Brown & McCollum*, and *McInnis*), one in the 1990s (*Taylor*), and another in the 2000s (*Kagonyera & Wilcoxson*). The cases came from seven different judicial districts and have no overlap in investigative actors or prosecutors. The seven cases are presented in chronological order for their consideration by the Commission. This ordering was chosen because it appears that, over the course of its work, the Commission was learning and progressing in its sophistication and those in the

60. *Id.* § 22-4135(g)(2).

61. *Id.* § 22-4135(g)(3).

criminal justice system were learning about the effectiveness of the Commission as well.

A. *The Greg Taylor Case*

This case involved an extremely suspicious circumstance. On the morning of September 26, 1991, Greg Taylor's Nissan Pathfinder was found by police stuck in a ditch only 100 to 150 yards from the mostly nude body of a deceased young woman. State's Exhibit #1 was literally an overhead photograph showing Taylor's vehicle at the end of a service road that led to the victim's body located on the edge of a cul-de-sac.⁶² A connection between the truck and the body seemed obvious. However, as the Commission proceedings demonstrated, the connection was nonexistent.

Erroneous, indeed manipulated, forensic evidence, which purportedly showed blood on Taylor's vehicle linking him to the homicide, played a critical role. Two "jailhouse" informants corroborated the otherwise generally weak prosecution case. One informant put the victim in Taylor's Pathfinder on the night of the murder, and the other told the jury that Taylor confessed to his involvement in the murder.

The Commission proceedings had two concentrations. The first was the weakness of the prosecution's case, including the physical evidence. The Commission conducted follow-up forensic testing that could not show any link between Taylor's vehicle, Taylor, or Johnny Beck (his companion), and the victim. The second focus was evidence supporting the guilt of a different person. The Commission's case was strongly opposed by the local prosecutor, Wake County District Attorney Colon Willoughby.

Taylor's presentation at the three-judge panel hearing differed from that of the Commission in that the adversarial presentation to the judges entirely omitted the alternate suspect evidence and focused principally on the weak forensic evidence, which it turned out had been misrepresented by state forensic lab employees. The judges unanimously found Taylor innocent by clear and convincing evidence,

62. N.C. Innocence Inquiry Comm'n Brief at 133, *State v. Taylor*, 91-CRS-71728 (N.C. Innocence Inquiry Comm'n Sept. 4, 2009) [hereinafter *Taylor Brief*], <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/Redacted%20Taylor%20Brief.pdf> [<https://perma.cc/74T5-7TC9>] (showing State's Exhibit #1 with Taylor's Pathfinder and the victim's body in the picture).

and the Commission's work was very much vindicated, albeit with a narrower and somewhat different focus.⁶³

1. The Crime and Initial Police Investigation

At about 7:30 a.m. on September 26, 1991, Officer D.L. Kennon of the Raleigh Police Department, while on routine patrol in a non-residential area, found a body of a young woman lying on the pavement in a cul-de-sac at the end of Blount Street. He determined the victim was dead by touching her leg with his foot, noting that her leg had started to harden.

The victim, Jacquetta Thomas, was an African American female who was mostly nude. Her underwear and pants were pulled down around her boots and her bra was pulled up just above her breasts. Her neck had been torn open and a large amount of blood was on the pavement, particularly around her neck.⁶⁴ Kennon's impression was that her throat had been cut, but the medical examiner later determined the wounds were not cuts but were instead tears, called lacerations, resulting from being struck by something like a baseball bat or brick.⁶⁵ At the scene, Kennon observed blue plastic baggies associated with crack cocaine near her body. A toxicology report showed the victim had a very high level of cocaine in her body.⁶⁶ Later investigation revealed that the victim was known to trade sex for drugs.⁶⁷

Kennon noticed that gravel on a service road going out of the cul-de-sac was disturbed and down that road he saw a white Nissan Pathfinder stuck in a gully 100 to 150 yards from the body.⁶⁸ This vehicle was registered to a white man named Greg Taylor.⁶⁹

2. Greg Taylor's Statements to the Police

Around 9:00 a.m., Greg Taylor arrived along with a friend and his wife to retrieve his vehicle. Detective Johnny Howard asked

63. A substantial part of the presentation at the Commission concerned an alternative perpetrator, see text accompanying *infra* notes 162–165, which was not part of the three-judge hearing, and the alleged forensic link to Taylor provided by what was identified as blood on his vehicle moved from weak in the Commission hearing to discredited and exculpatory at the three-judge hearing. See *infra* notes 168–186 and accompanying text.

64. Taylor Brief, *supra* note 62, at 5–6, 9 (reporting testimony of Officer Pagani).

65. *Id.* at 6 & n.2.

66. *Id.* at 16. The medical examiner testified that it was a “very high concentration of cocaine”; indeed, it was a potentially lethal level. *Id.*

67. *Id.* at 1.

68. See *id.* at 1, 6–7 (describing the distance as 150 yards while Officer Kennon estimated it to be 100 yards).

69. *Id.* at 21.

Taylor to accompany him to the police station for an interview due to the proximity of Taylor's vehicle to the body, and Taylor agreed.⁷⁰ At first, Taylor stated that he had visited friends, watched part of a baseball game, and stopped by the house of a black acquaintance, Johnny Beck, where he had a few beers. They then went to Blount Street to do some four-wheeling, arriving there about 2:30 a.m. and drove up a road leading out of the cul-de-sac where they were for about an hour before getting stuck. Unable to extricate the Pathfinder, he and Beck walked out into the cul-de-sac. Taylor said they saw a body and decided they better leave.⁷¹ He insisted that the body was not in the cul-de-sac when they arrived.⁷²

After a short break,⁷³ Taylor included information about using drugs that evening.⁷⁴ He said he was drinking beer at a friend's house until a baseball game they were watching went into extra innings. He then went to Beck's house, and they got some cocaine.⁷⁵ They smoked cocaine first at Beck's brother's house. They bought cocaine several more times during the evening and smoked it at a number of different locations, ultimately ending up at the Blount Street cul-de-sac. After smoking some there, they decided to go up the service road where they got stuck.⁷⁶ They walked to a nearby gas station where they persuaded a woman named Barbara to give them a ride, offering her gas money. She took them to what he described as a "rock house" where they smoked more cocaine. Around 7:00 a.m., the woman

70. *Id.* at 21–22. Detective Howard and Lyles interrogated Taylor that morning. *Id.* at 23.

71. *Id.* at 22, 177–78. Beck was the first to notice it was a body. *Id.* at 177. In the dark, Taylor initially thought it was a roll of carpet. *Id.* at 181.

72. *Id.* at 190. Taylor told Howard that his lights were on when he entered the cul-de-sac and the body was not there. *See id.* at 255–56.

73. *See id.* at 192. Taylor was interviewed two times on the day the body was recovered. The first ended at 11:20 a.m., and the second ended at 6:25 p.m. *Id.* at 23–24; *see also id.* at 175–206, 254–75 (containing transcripts of first and second statements, respectively).

74. *See id.* at 197.

75. Beck stated to Commission investigators that on two prior occasions Taylor met him and together they bought and used drugs. He explained that it was unusual for white guys to hang out in the area where they bought the drugs. Beck knew the dealers and the safe areas there. Taylor stayed in the vehicle, and Beck bought the drugs. *See* Transcript of Hearing Day 1 at 238, 260, *State v. Taylor*, 91-CRS-71728 (N.C. Innocence Inquiry Comm'n Sept. 4, 2009) [hereinafter *Taylor Hearing Day 1 Transcript*], <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/TaylorHearingDay1.pdf> [<https://perma.cc/8KMY-EKWQ>].

76. *See Taylor Brief, supra* note 62, at 197–98.

dropped Taylor off at a gas station, and he called his wife to pick him up.⁷⁷

Taylor maintained his and Beck's complete innocence, even after Howard falsely told Taylor that the police had evidence showing his guilt, including a false claim that Beck had incriminated him; Howard further suggested that Taylor should become a witness rather than a defendant. He told Howard that they had no contact with the victim, that she had never been in his vehicle, and that there was no reason for blood to be on his vehicle or on his clothing.⁷⁸

3. Johnny Beck's Statements to Law Enforcement

Early in his interview, Taylor gave the police Beck's contact information, and Howard interviewed Beck the same day. Beck's statement differed only in minor detail from Taylor's. Beck said Taylor was trying to get some "dope" and met him at about 9:30 p.m. They got dope and "hit a little bit" in Taylor's truck. They then bought more drugs at a different location and went to his brother's house and drank beer. About 1:10 a.m. they left, bought more drugs, and drove to the Blount Street cul-de-sac. They first parked in the cul-de-sac to use the drugs, and then drove up the service road and parked behind some bushes. Finally, they decided to go four-wheeling and got stuck. Beck estimated that they may have been at the Blount Street location for a couple hours. As they walked out Beck saw something he thought was a rag doll or a body, but was not sure. Like Taylor, he told the police the body was not in the cul-de-sac when they arrived.

Beck told Howard that he and Taylor walked to a nearby gas station and a black woman in her thirties named Barbara gave them a ride. Like them, she was looking to do some drugs and, in his words, wanted to get a "free be [sic]." They bought more cocaine and went to a house where they used it. Barbara dropped Beck at a grocery store around 6:00 a.m., and he went home. Near the end of the interview, Beck agreed to show the detectives various locations, including the places they bought cocaine, where they parked in the

77. *Id.* at 199, 201–03. Police located this woman, Barbara Avery-Ray, *id.*, and when Howard interviewed her on October 1, 1983, she verified picking up the two men and driving them to get more drugs. Taylor Hearing Day 1 Transcript, *supra* note 75, at 273–74.

78. Taylor Brief, *supra* note 62, at 175–206, 254–75 (containing the first and second statements, respectively). Taylor's interrogation was in two parts, both of which were recorded. The recording of the first segment was played for the jury. *Id.* at 22.

cul-de-sac to smoke it, and the house on East Street where Barbara took them.⁷⁹

4. The Bloodhound Scent Evidence

About an hour and a half after the discovery of the body, Officer Andy Currin arrived with a bloodhound. After getting the victim's scent, the dog was positioned about twenty-five feet from the body and given the command to find, but lost the scent. After being positioned about thirty feet from the vehicle, and again being given the scent, the dog made its way to the truck. First, it "jumped up" on the driver's side door. Next, the dog did the same on the passenger's side door, and then circled the vehicle, which Currin said was behavior indicating the scent was somewhere on the vehicle.⁸⁰

5. The Serology Evidence

Agent Donald Pagani of the City County Bureau of Identification ("CCBI") arrived at the crime scene just before 8:00 a.m. and began processing the crime scene for evidence, including the truck.⁸¹ In the daylight, police observed what appeared to be blood showing the path of the vehicle passing directly beside the body and heading out of the cul-de-sac.⁸² That night, Pagani and Agent William Hensley, supervisor for the CCBI, went back to the cul-de-sac when it was dark to spray luminol around the area where the body was found. Luminol, a preliminary test for blood, fluoresces in the dark on contact with blood. Hensley sprayed luminol, which he said showed a track of what appeared to be blood made by tires passing by the body, probably through a pool of blood near the head and left arm, then circling around the body, and finally heading into the service road.⁸³

79. *See id.* at 226–32, 237–39, 247–50 (Howard supplementary report of interrogation conducted Sept. 26, 1991). It turned out that Eva Kelly, a jailhouse informant, who testified against Taylor lived at this house. *See id.* at 282.

80. *Id.* at 17–18. Kennon denied that officers had touched the body and then touched the truck. *Id.* at 8. At trial, defense counsel brought out that the bloodhound had not been trained to track the scent from a dead body. *Id.* at 17.

At an unsuccessful motion for post-conviction relief in 1998, an officer from another police department, who also worked as a private canine trainer, gave the opinion that she did not believe that the dog connected the victim's scent to the vehicle. The expert believed that the dog was re-alerted to the vehicle after it lost the scent and exhibited a conditioned reward-based response to the vehicle. *Id.* at 317–18.

81. *Id.* at 8–10. The examination at the scene only began after the bloodhound had completed its tracking work and it continued later at a secure location. *See id.* at 8, 10.

82. *Id.* at 9–10.

83. *Id.* at 10. Pictures he attempted to take did not turn out well and he instead drew a diagram that depicted the reactions of the luminol. *See id.* at 169–70 (State's Exhibit 36).

The inside of the truck was processed for trace evidence and fingerprints.⁸⁴ Because the police believed the passenger side of the vehicle had passed through the victim's blood, they expected blood could have been thrown under the passenger-side fender. Investigators did phenolphthalein testing, which is another presumptive test for blood, and received a positive reaction on the underside of the vehicle near the wheel and in one other area. Using gauze thread samples, police investigators collected the stains and sent several samples in addition to the fender liner to the North Carolina State Bureau of Investigation ("SBI") for further examination.⁸⁵

Fingerprint examination showed one fingerprint on the driver's side of the vehicle, which was identified as being left by Taylor and one from the passenger side, which was left by Beck. The victim's fingerprints were not found inside the truck.⁸⁶ Hair and fiber analysis of evidence recovered from the interior of the vehicle and the victim's body and clothing revealed nothing linking the victim to the vehicle.⁸⁷ A cutting from the victim's underpants tested positive for semen, but the blood typing of the stain was inconclusive.⁸⁸

6. Medical Examiner's Findings

Dr. Deborah Radisch, who performed the autopsy, found wounds to the head and neck that were caused by blunt-force trauma from an instrument such as a baseball bat or brick. The blows caused lacerations or tears, rather than cuts, which are typically made by a sharp instrument. She found a number of other shallow wounds made by a cutting-type instrument—mainly on the victim's chest. The victim's skull was fractured in several places and bone fragments from the fractures had been driven into the brain. The cause of death was

84. *Id.* at 10.

85. *Id.* at 11, 20. Referring to the SBI report, Pagani testified at trial that the thread stain from the fender did reveal the presence of blood. *See infra* note 108 and accompanying text.

86. Taylor Brief, *supra* note 62, at 10–11.

87. *See id.* at 12–13.

88. Both Taylor and Beck were secretors, meaning their semen would show their blood type. DNA testing conducted as part of the Commission investigation produced a DNA profile for the semen stain, and both Taylor and Beck were excluded as the source. *Id.* at 12 n.8; *see id.* at 173 (Nov. 7, 1991, Lab Report).

Despite the victim's body being mostly nude, the case was not treated as a rape. The autopsy reported no vaginal injuries. *See id.* at 215 (Autopsy Report of Jacquetta Lashawn Thomas).

“blunt traumatic or blunt force injuries of the head and neck.”⁸⁹ The toxicology report showed a very high concentration of cocaine in the victim’s body.⁹⁰

7. “Jailhouse” Informants

a. *Eva Marie Kelley*

The night following the discovery of the victim’s body, Detective William Blackman went to a Raleigh neighborhood plagued by drug trafficking and prostitution to talk to people he believed may have seen the victim, who was known as Jackie. He took with him pictures of the victim, Taylor, Beck, and the white Pathfinder. There he talked to Eva Marie Kelly, a white female prostitute. She told Blackman that she had seen the men and vehicle the night before around 11:00 p.m. in front of her house on East Street. She told Blackman that Taylor was driving and Beck was in the passenger seat. They told her they had some coke and asked if she wanted to party and get high, but she refused and they left.⁹¹ Kelly was unable to recognize the victim from the picture Blackman showed her, but said she knew a Jackie who hung out on a street in that area. Blackman then communicated his goal, asking whether she could tell him about someone who “saw Jackie get in the truck with these guys.”⁹²

On October 1, 1991, Kelly was interviewed at the police department by Howard and Blackman.⁹³ She again identified the pictures of Beck, Taylor, and Taylor’s white Pathfinder, which she said she saw on East Street about 12:00 a.m.⁹⁴ She identified three others—Texas, Whoopie, and Shelia—as being on the street with her.⁹⁵ When again shown a picture of Thomas, she said the photograph did not look like anyone she knew.⁹⁶

89. *Id.* at 14–15. The cocaine concentration was at a potentially lethal level. *Id.* at 16; See Transcript of Hearing Day 2 at 136, *State v. Taylor*, 91-CRS-71728 (N.C. Innocence Inquiry Comm’n Sept. 4, 2009) [hereinafter *Taylor Hearing Day 2 Transcript*], <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/TaylorHearingDay2.pdf> [<https://perma.cc/7HXM-F5LN>].

90. *Taylor Brief*, *supra* note 62, at 16; see *Taylor Hearing Day 2 Transcript*, *supra* note 89, at 137.

91. See *Taylor Brief*, *supra* note 62, at 26–28; see also *id.*, at 283–84 (Blackman supplementary report of interview conducted on Sept. 27, 1991).

92. *Id.* at 285.

93. *Id.* at 27, 288.

94. See *id.* at 287–88. In this interview, Kelly said the black guy (Beck) told her that they had cocaine and asked if she wanted to go with them, but she walked away. *Id.* at 288.

95. See *id.* at 288–89. Detectives subsequently interviewed these three women on October 1–2, 1991. See *Taylor Hearing Day 1 Transcript*, *supra* note 75, at 246–47

Over a year later, while Kelly was in jail facing probation revocation of two five-year sentences she had received for cocaine possession, the prosecutor met with Kelly. In this conversation, Kelly for the first time said that she had seen the victim with Taylor and Beck. The prosecutor later came back with a written agreement to testify, which stated that, in exchange for truthful testimony, the prosecution would not oppose her two sentences running concurrently if probation was revoked. Kelly agreed to the proposal and signed the agreement.⁹⁷

Kelly then testified at Taylor's trial. She said that after she rebuffed Beck's invitation to join the men she saw them again in a house with Jackie and Whoopie using drugs. She had entered the

(Crowder on Oct. 1, 1991); Taylor Brief, *supra* note 62, at 293, 301 (Pate and Edwards on Oct. 2, 1991).

Shelia Crowder told the police she had seen a white Pathfinder with a white guy driving and a black guy asking for drugs. They asked her where they could get "an eight-ball." She said she saw them three times. The first was when they asked her about drugs on East Street, the second as she was walking up the street, and the third time she was at the cab stand when she saw the victim get into their vehicle. She said the victim was wearing a short skirt, which did not match the clothing (pants) the victim was wearing when her body was found. *See* Taylor Hearing Day 1 Transcript, *supra* note 75, at 247–48.

Parley Pate, who was also known as Texas or Tex, said that she saw Beck, Taylor, and the vehicle around midnight while she was talking to Kelly. Pate said Shelia was also present and Whoopie might have been there. She recognized Thomas but did not say anything about seeing her at that time or with the men. She did say that she saw the vehicle drive around the area and stop at Cabarrus and East Street where someone, she thought a female, got into the vehicle. *See* Taylor Brief, *supra* note 62, at 294–97 (Howard supplementary report of interview conducted Oct. 2, 1991).

Phyllis Edwards, known as Whoopie, was interviewed by Howard on October 2, 1991. She told him that she had seen Thomas before midnight. She had not seen Kelly with the victim. Her statement contained nothing consistent with her being in a house with Beck, Taylor, and the victim. *See id.* at 301–09 (Howard supplementary report of interview conducted Oct. 2, 1991).

Earlier in his canvas of the area, Blackman also interviewed Craig Taylor, who told Blackman that he saw Jackie at about 12:30 a.m. on Wednesday night in the 500 block of Bloodworth. About five minutes later, he said he saw a white guy on foot that he identified as Greg Taylor. Taylor was asking about buying some rocks of crack cocaine. Greg Taylor bought the drugs from a friend and walked down the street. Jackie followed right behind him. Craig Taylor did not recognize the picture of Beck and said he had never seen the white Pathfinder. *See id.* at 276–78 (Detective Bissette supplementary report of interview conducted Sept. 27, 1991).

96. Taylor Brief, *supra* note 62, at 290. When asked whether Jackie could have been standing there, Kelly responded that other people were there. *Id.* at 290. When asked whether she knew a Jackie who walked the street and was probably a prostitute, Kelly said she did but that person was still alive and not the Jackie the police were interested in. She did not mention knowing another person named Jackie. *Id.* at 291.

97. *See id.* at 29–30; *see also id.* at 208 (Agreement for Truthful Testimony, Apr. 12, 1993). Kelly explained in her testimony that when she first told the prosecutor about seeing Jackie with Taylor and Beck that she had no plea agreement, and it was the prosecutor's decision to give her a reward for her testimony. *See id.* at 30.

house with “a date” but left because he was getting nervous. About fifty minutes later, she returned and saw the two men leave the house with Jackie. She saw the three of them walk toward a nearby street, and shortly thereafter saw Taylor’s truck drive away.⁹⁸ She explained that she did not tell officers about seeing the victim with Taylor and Beck when she was first interviewed because she did not want to bring police to that house since people were still selling drugs there. She also stated that the house had subsequently been torn down.⁹⁹ Kelly’s identification of the victim at trial was curious. She said Jackie was “new on the block” and had seen her “maybe four or five times.”¹⁰⁰ However, she stated that “the girl Jackie that I saw with these two men . . . and that dead body still doesn’t look like the same person.”¹⁰¹

b. Ernest Andrews

Ernest Andrews contacted the police about a conversation he had with Taylor while they were confined together in the Wake County Jail.¹⁰² When interviewed on October 2, 1991, Andrews told the detective that Taylor first told him that he had just discovered a body and that the police were saying he killed her. Andrews told the police that Taylor later said he and a black guy named Johnny and the girl “all were going to have a good time” but “the girl got scared and jumped out and ran.”¹⁰³ Taylor said that his partner jumped out of the vehicle, “ran her down” and hit her.¹⁰⁴ Andrews also told the police that Taylor said the victim’s “throat was cut.”¹⁰⁵

At Taylor’s trial, Andrews testified that Taylor was asked by another prisoner how the woman died and Taylor “said with a smile on her face which there are several ways that could go, you know,

98. *Id.* at 28.

99. *Id.*

100. Transcript of Evidence at 371, *State v. Taylor*, 91-CRS-71728 (N.C. Super. Ct. Feb 17, 2010), <http://www.wral.com/asset/news/local/2009/09/16/6014105/79539-TRANSCRIP.pdf> [<https://perma.cc/9LGK-HQWF>]. This explanation appears to conflict with her statement to the police on October 1, 1991. After not recognizing the victim’s picture shown to her by the police, she was asked whether she knew a woman named Jackie who walked the street who was probably a prostitute. Kelly responded that she did but that woman was still alive and not “the same Jackie” the police were talking about. She did not mention knowing another Jackie. Taylor Brief, *supra* note 62, at 290–91.

101. Transcript of Evidence, *supra* note 100, at 393; *see also* Taylor Brief, *supra* note 62, at 30.

102. *See* Taylor Brief, *supra* note 62, at 32–33, 40.

103. *Id.* at 312 (Raleigh Police Department Supplemental Report of Detective Bissette).

104. *Id.*

105. *See id.* at 311, 313–14 (stating multiple times that her throat was cut).

there's a sexual content to a smile on the face but this is not like that. One of the guys, a black guy asked well what do you mean? He says, well, she was cut from ear to ear, throat cut."¹⁰⁶ Andrews told the jury that when he contacted the police about Taylor's statements he had already been sentenced on his embezzlement conviction but believed contacting the police would look good for parole purposes. Andrews said he had no deal with the prosecution when he testified.¹⁰⁷

8. Taylor's Trial

Taylor's trial began on April 13, 1993. In his testimony, Officer Pagani not only testified about gathering the evidence that gave preliminary indications of there being blood, he also testified that the SBI forensic examination of the automobile fender liner "gave chemical indications for the presence of blood."¹⁰⁸ The prosecutor, Tom Ford, argued to the jury that the evidence showed the victim's blood was on Taylor's vehicle,¹⁰⁹ and repeatedly referenced the blood on the vehicle.¹¹⁰

Taylor did not testify, and the defense put on no evidence. On April 19, 1993, the jury returned a verdict of guilty on the first-degree murder charge. Taylor was later sentenced to life imprisonment.¹¹¹ Beck's charges were dismissed on August 18, 1993. The prosecutor's dismissal form stated there was insufficient evidence to warrant prosecution at that time because "unlike the co-defendant . . . this defendant made no inculpatory statement."

9. Commission Investigation and Proceedings

The Commission conducted numerous witness interviews. It also conducted additional forensic testing of the physical evidence beyond that done for trial, seeking any trace evidence that showed contact

106. *Id.* at 33 (Taylor trial transcript); *see also id.* at 314 (same version in statement to the police). At the Commission hearing, Andrews said he asked the question "what do you mean"? Taylor Hearing Day 1 Transcript, *supra* note 75, at 79; *see id.* at 96–98 (asserting that no other inmates were talking to them and that he asked that question).

107. *See* Taylor Brief, *supra* note 62, at 40–42 (Taylor trial transcript).

108. Transcript of Evidence, *supra* note 100, at 145; *see also* Taylor Brief, *supra* note 62, at 11. Pagani stated the report was completed by forensic serologists Deaver and Taub at the SBI. Transcript of Evidence, *supra* note 100, at 140.

109. Transcript of Evidence, *supra* note 100, at 545–46 ("That's exactly where they expected to find it. And it wasn't a miracle that they found it there . . . on the outside fender edge."); *cf. id.* at 561 ([I]f the body wasn't there when you arrived . . . how did you get the blood on you?").

110. *Id.* at 546; *id.* at 578 ("there's blood on the car").

111. Taylor Brief, *supra* note 62, at 131. He was found not guilty of accessory after the fact to murder. *Id.*

between the victim and Taylor and Beck either through Taylor's Pathfinder or the victim's person or clothing.¹¹² The results of those interviews and testing are presented below in connection with the Commission's hearing, which was held on September 3 and 4, 2009.

10. Forensic Evidence

a. Testimony of Dwayne Deaver

Dwayne Deaver, Assistant Special Agent in Charge of the SBI Crime Lab, testified before the Commission. His testimony, which became an extremely significant matter at the three-judge panel hearing, was conflicting. He testified to positive results for blood on two samples from Taylor's vehicle, one taken from the fender liner (Item #16), and the second, a thread sample, was taken from the edge of the fender above the tire and rim (Item #18).¹¹³ The SBI laboratory report, which was referenced at trial by Officer Pagani, stated that "[e]xamination of Items #16, #18, and #46 [the victim's pants] gave chemical indicators for the presence of blood."¹¹⁴

On the fender liner, Item #16, Deaver said that the phenolphthalein test, a presumptive test, was positive. That test is supposed to be followed by a second test, Takayama, to confirm that the substance was blood, and then another test to confirm that the blood was human blood.¹¹⁵ Deaver testified that he was not able to do the follow-up tests on that item—"[b]eyond phenolphthalein [he] got no result."¹¹⁶ When asked whether for Item #18, the thread sample from the edge of the fender, chemical indications of blood were the same, he answered "[t]hat's correct."¹¹⁷ But then he said he didn't know "what happened with testing on that."¹¹⁸ After examining a document, he responded: "Same thing on that, Takayama test was negative."¹¹⁹

A later exchange with Commissioner Becton, however, contradicted that last response. Becton began his question, "[a]nd as I

112. Taylor Hearing Day 1 Transcript, *supra* note 75, at 106–11.

113. *Id.* at 124, 126.

114. Taylor Brief, *supra* note 62, at 173 (SBI Laboratory Report, Nov. 7, 1991 signed by Deaver and Taub). The thread sample from another location on the vehicle where blood was suspected by investigators, Item #17, did not even give a positive result under the preliminary test. Taylor Hearing Day 1 Transcript, *supra* note 75, at 133.

115. Taylor Hearing Day 1 Transcript, *supra* note 75, at 124–25.

116. *Id.* at 126.

117. *Id.*

118. *Id.*

119. *Id.*

understand it, 16 and 18 gave a preliminary indication of blood, but you could not do test two”¹²⁰ Deaver interrupted the question with “[t]hat’s correct.”¹²¹ Becton continued, “[t]o show that it was blood or test number three to show if it was blood, even if it were blood, it was human blood?”¹²² Deaver again responded: “That’s correct.”¹²³

11. Additional Testing by the SBI

Russell Holley of the SBI testified that the items believed to be blood on the vehicle were retested upon the Commission’s request, and on subsequent testing, the results revealed that none of the items even gave a preliminary positive response for the presence of blood.¹²⁴

Next, Kristin Hughes testified that the SBI was asked by the Commission to do DNA testing in 2008 and 2009. No results were obtained from the samples from Taylor’s Pathfinder, which the SBI had reported positive for blood.¹²⁵ DNA profiles were extracted from the sperm fraction found on the victim’s underpants in 1991 and from a vaginal swab discovered during this subsequent DNA testing. The new testing showed the profiles were from the same person, and excluded both Taylor and Beck as the source of the DNA.¹²⁶ The victim’s clothing was also tested for DNA, and several partial DNA profiles were obtained. However, either no matches could be made to Taylor or Beck, or the profile was a mixture from multiple sources from which no conclusions could be reached.¹²⁷

12. Further Forensic Testing

The Commission requested more specialized and sensitive DNA testing. Meghan Clement, a DNA expert with LabCorp’s private forensic testing laboratory, testified to further DNA testing on suspected blood found on Taylor’s vehicle. The lab concentrated and amplified the sample in an effort to obtain a DNA profile, but could not obtain a sufficient quantity to develop one.¹²⁸ Indeed, from the

120. *Id.* at 132.

121. *Id.* at 132–33.

122. *Id.* at 133.

123. *Id.*

124. *Id.* at 146–51 (describing results on 2009 report). The negative result might have resulted because all the substance was consumed during testing. *Id.* at 148.

125. *Id.* at 162–63. Hughes indicated this could be because the amount was too small, it had degraded over time, or it was not human blood. *Id.* at 163.

126. *Id.* at 160–61.

127. *Id.* at 166–68.

128. *Id.* at 177–78, 181–82.

samples that had tested positive for blood by the SBI, Clement stated her laboratory's tests found "zero quantitation."¹²⁹

Clement reported that her laboratory also tested a cigarette butt found in the vehicle, and matched the DNA profile to Taylor's profile. The lab also tested a cigarette wrapper and beer can, and found DNA mixtures. The victim was excluded as a contributor to those mixtures, but Taylor could not be excluded.¹³⁰ At the end of her testimony, Commissioner Becton asked Clement in summary whether there was anything in her testing that linked the victim to the exterior or interior of Taylor's vehicle. Her answers to the questions were: "no connection" and "[n]othing."¹³¹

Clement's laboratory did further testing on the vaginal swab and underpants and was able to obtain DNA mixtures from both, including DNA from at least one male. Taylor and Beck were excluded as the contributor of both.¹³² The hairs found on the victim's face were examined for mitochondrial DNA, which is used when the hair does not include the hair root. The DNA profile matched the victim.¹³³ The victim's two sets of underpants, blouse, and pants were swabbed. Using Y-chromosome testing, which isolates male DNA and basically ignores female DNA in a mixture, partial profiles were obtained from these four items.¹³⁴ Results were not obtained at sufficient levels to identify either Taylor's or Beck's DNA on any of these items, and the tests were inconclusive.¹³⁵

129. *Id.* at 178, 201; *see also* Complaint at 16, Taylor v. Deaver, Case 5:11-cv-00341H, (E.D.N.C. June 28, 2011) (asserting that as to Items #16 and #18 LabCorp forensic chemist Meghan Clement found DNA quantities of 0.000%).

130. Taylor Hearing Day 1 Transcript, *supra* note 75, at 185–86. A DNA profile was developed from a cigarette butt found among debris in the cul-de-sac, but Taylor and Beck were excluded. *Id.* at 186–87.

131. *Id.* at 200–01.

132. *Id.* at 179–80.

133. *Id.* at 184.

134. *Id.* at 188–89.

135. Both men were excluded as contributors to the partial DNA profile from the blue underpants, *id.* at 196, and the waistband of the victim's pants, *id.* at 198. A mixture containing a partial DNA profile from at least three males was found on the tan underpants. *Id.* at 190. Beck was excluded as a contributor to that mixture but Taylor could not be. *Id.* at 191. The partial profile gave results from only five of the seventeen areas tested, and as a result, the probability of random match is relatively high, which Clement described as roughly one in eight. *Id.* at 190–92. A partial DNA profile of a mixture of two males was obtained from the victim's blouse. *Id.* at 197. Taylor was excluded as a contributor, but Beck could not be; Clement testified that one out of thirty-three males would not be excluded. *Id.*

13. Eva Kelly's Statement to Commission Investigators and Testimony

Eva Kelly testified before the Commission that she knew a person named Jacquetta Thomas in 1991 “from the streets.”¹³⁶ She repeated her story that she had seen Taylor and Beck in the Pathfinder, but this time said the white guy was “hollering obscenities” at her.¹³⁷ Next, she greatly altered the timing of seeing the men with the victim. She testified that she saw them again “[I]ike through the night, hours later” when she entered a house with “a trick” and saw the two men, Jacquetta, and Whoopie in the kitchen with drugs on the table.¹³⁸ Later they left the house, and Kelly saw the victim approach Taylor's truck.¹³⁹ One of the commissioners asked Kelly what she meant by “through the night and hours later,” and she said, “It was, it was light.”¹⁴⁰ She was later asked, “[D]id you say it was getting light by this time?”¹⁴¹ Kelly responded: “It was light.”¹⁴² Since the victim was killed well before dawn, Kelly's version of events given to the Commission that she saw the victim with Taylor and Beck could not have been accurate as to the timing.

14. Ernest Andrews' Statement to Commission Investigators and Testimony

Ernest Andrews was interviewed by Commission investigators and testified at the hearing. Andrews maintained in both his interview with investigator, Sharon Stellato, and in his testimony before the Commission that Taylor made the incriminating statements that he testified to at Taylor's 1993 trial.¹⁴³ However, he changed one significant detail. In his interview with Stellato, Andrews said Taylor

136. *Id.* at 38. Kelly had married by this point and her last name was Hitch. *Id.* at 37. She again claimed she had no deal with the police when she gave her statement. *Id.* at 46–48.

137. *Id.* at 42.

138. *Id.* at 43–44.

139. *Id.* at 46, 50.

140. *Id.* at 54.

141. *Id.* at 55.

142. *Id.*; *id.* at 55–56 (“It was already light outside?” “Uh-huh (yes).” “Yeah.” “So it would have been in the early morning hours, is that correct?” “Yeah.”).

143. *Id.* at 67–74 (recounting Stellato interview of Andrews); *Id.* at 74–104 (testimony before the Commission). Andrews also stood by his incriminating statements when he testified before the three-judge panel. *See Witness Stands by Testimony at Taylor Hearing*, ABC7 EYEWITNESS NEWS (Feb. 15, 2010, 6:33 PM), <http://abc7.com/archive/7277928> [https://perma.cc/L5NX-93ER].

talked to him because Andrews was “the white person in there.”¹⁴⁴ At the Commission hearing, he repeated his theory of why Taylor talked to him about the crime¹⁴⁵ and said he did not see Taylor talk to anyone else.¹⁴⁶ A Commissioner read to Andrews his trial testimony in which he described “several of us sitting around and one of them said, well, how did she die?”¹⁴⁷ Despite the clarity of his testimony at trial that another inmate asked this question, Andrews responded, “I think I’m the one that asked him how she died.”¹⁴⁸

15. Johnny Beck’s Statement to Commission Investigators

Beck insisted in his interview with Commission investigators that both he and Taylor were innocent, had never seen the victim before, did not pick her up, and first saw the body when walking out after the truck became stuck. Investigators found no evidence that Beck had said anything in the intervening years that suggested either his or Taylor’s guilt.¹⁴⁹

16. Statement by Barbara Avery-Ray

In June 2009, Commission investigators interviewed Barbara Avery-Ray, the woman who picked up Taylor and Beck after Taylor’s Pathfinder was stranded. Her statement was consistent with the police interview she gave on October 1, 1991. She confirmed that she picked up a white male and black male in her Honda Civic around 3:00 a.m. on Blount Street. They told her their car had gotten stuck and they would give her money to drive them around. Their demeanor was calm, and she did not observe blood on their clothing or shoes. She drove the three of them to a house on East Street to get drugs, although Avery-Ray denied that she went inside the house or was involved in the use of drugs. They stayed at that house, which other evidence showed was Eva Kelly’s residence, until 5:45 a.m.¹⁵⁰

After the testimony by Kelly and Avery-Ray, a very different explanation for Kelly’s testimony about seeing Taylor and Beck with the victim had been suggested. Kelly told the Commission that she

144. Taylor Hearing Day 1 Transcript, *supra* note 75, at 71; *see also id.* at 86–87 (testifying to Commission that Taylor talked to Andrews because he believed he was the only other white person there).

145. *Id.* at 86–87.

146. *Id.* at 92.

147. *Id.* at 98.

148. *Id.* (question by Commissioner Becton).

149. *Id.* at 239, 241 (Stellato’s testimony regarding Beck statements).

150. *Id.* at 273–80 (describing Stellato’s testimony regarding Avery-Ray’s statement and Commission interview).

saw Taylor and Beck leave from her house with the victim when it was already light out. Avery-Ray, who like the victim was African American, placed Taylor and Beck leaving that same house in her car at roughly dawn. As Taylor and Beck described, Kelly may have seen the two men there with Avery-Ray and confused the identity of the woman she saw with them.¹⁵¹ Kelly had even testified at trial that the picture of the victim did not look like the person she knew as Jackie.¹⁵²

17. Crime Scene Analyst's Testimony

Larry McCann, an expert in crime scene analysis, reached a number of conclusions based on his analysis of the evidence.¹⁵³ Most notable was that the victim was beaten with a heavy object, which McCann believed was likely a wooden two-by-four; that the perpetrator or perpetrators would have been covered in blood; and that the Pathfinder was likely not involved in the homicide.¹⁵⁴

18. Medical Examiner's Testimony

Dr. Deborah Radisch, the medical examiner who performed the autopsy on the victim, testified and confirmed that the wound to the neck was not consistent with a pure slit throat—a knife being drawn across her neck. Instead, they were lacerations or tears consistent with blunt-force trauma.¹⁵⁵

19. Greg Taylor's Deposition

Commission Investigator Sharon Stellato testified that Greg Taylor has always maintained his and Beck's innocence to his trial lawyer and throughout his questioning by her.¹⁵⁶ Additionally, Taylor

151. The commissioners asked a number of questions indicating the possibility of such confusion. *Id.* at 275–79.

152. Taylor Brief, *supra* note 62, at 290.

153. Taylor Hearing Day 2 Transcript, *supra* note 89, at 72–77.

154. *Id.* at 80–92. McCann doubted the vehicle was associated with the brutal attack, for if it were nearby at the time of the murder, its exterior would have been splattered with blood, and if the perpetrator or perpetrators had gotten into the vehicle, there was a very high probability that blood would have on the vehicle's interior. *Id.* at 81, 94. McCann also reached the conclusion that no rape occurred. Instead the scene had been staged to look like a sexual assault had occurred. *Id.* at 81, 95, 101–03.

155. *Id.* at 131–33. Dr. Radisch acknowledged that the smaller wounds could have been inflicted by a dull knife, but the larger ones resulted from blunt-force trauma. *Id.* at 141–42.

156. Taylor Hearing Day 1 Transcript, *supra* note 75, at 17; Taylor Hearing Day 2 Transcript, *supra* note 89, at 220, 230–31; *see also* Affidavit of Michael Dodd at 1, *State v. Taylor*, 91-CRS-71728 (N.C. Super. Ct. Aug. 17, 2009), <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/Handouts.pdf> [<https://perma.cc/3V66-U5AY>] (affidavit of trial

refused to implicate Beck, despite being repeatedly told falsely by Detective Howard during his interrogation that Beck had said Taylor killed the victim and invited to implicate Beck as the murderer.¹⁵⁷ Taylor also resisted efforts to persuade him to indicate his presence and incriminate Beck in exchange for a deal offered by the prosecutor shortly after he was convicted.¹⁵⁸ He continued to resist incriminating himself or Beck as he submitted his post-conviction motion—even in exchange for help from the parole commission or governor.¹⁵⁹

Taylor's sworn deposition was consistent with his statements to the police, but provided more detail. He testified that he still did not remember seeing the body when he and Beck took the wrong turn that put them in the cul-de-sac at the end of Blount Street.¹⁶⁰ In his description of the stop that he, Beck, and Avery-Ray made at the house on East Street, Taylor testified that he saw two white women with blonde hair inside the house and had recognized Kelly as one of them when he testified at trial.¹⁶¹ Throughout his testimony, Taylor consistently maintained his and Beck's complete innocence.

20. The Theory of an Alternate Suspect, Craig Taylor

Although not of initial interest, Craig Taylor, a black male unrelated to Greg Taylor, became a major focus of the Commission's investigation in its later stages.¹⁶² In the process of re-interviewing witnesses previously interviewed by the police, Stellato interviewed him in prison where he was serving a sentence as a habitual felon.¹⁶³

attorney). Taylor also maintained his and Beck's innocence to his post-conviction attorney. See Affidavit of Thomas F. Loflin III at 2, *State v. Taylor*, 91-CRS-71728 (N.C. Super. Ct. Aug. 28, 2009), <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/Handouts.pdf> [<https://perma.cc/3V66-U5AY>].

157. See Taylor Brief, *supra* note 62, at 257–68. In Taylor's second interrogation, Howard repeatedly asserted that Beck had told him that Taylor killed the victim. For example: Q: "Did John kill her? A: "No." Q: "Well, why does he say you did?" A: "I have no idea." *Id.* at 260. Howard and Taylor have a similar set of exchanges later in the interrogation. *Id.* at 266.

158. Conversation with Commission Executive Director Smith and Associate Director Stellato, *supra* note 24 (recounting her interviews with both Assistant District Attorney Tom Ford and Taylor); see also Taylor Hearing Day 2 Transcript, *supra* note 89, at 205.

159. Affidavit of Thomas F. Loflin III, *supra* note 156, at 2–3.

160. Taylor Hearing Day 2 Transcript, *supra* note 89, at 224–27 (Stellato testimony describing Greg Taylor's deposition). Taylor said that after listening to all the testimony, he wondered if the body might have been there and he just missed it, but despite being pushed on this issue by Stellato, he still didn't remember seeing it. *Id.* at 224–25.

161. *Id.* at 227–29.

162. Taylor Hearing Day 1 Transcript, *supra* note 75, at 292 (Executive Director Montgomery-Blinn described him as "the most significant portion of our investigation recently.").

163. *Id.* at 299–301.

Over the course of four interviews, Craig Taylor provided a detailed confession of guilt and became an alternate suspect.¹⁶⁴ The investigators obtained corroboration of some details, but they also learned that he was seriously ill with AIDS, had mental health problems, and had also confessed to the homicide of a homeless man in Raleigh, which they could not verify.¹⁶⁵

21. Commission Decision

At the conclusion of the hearing, the commissioners voted to authorize judicial review.¹⁶⁶ While setting out the witness and evidence considered, the Commission's formal opinion provides, like those in all other cases that reached positive resolution at the Commission level, not an explanation of what evidence of innocence it found compelling, but rather only a report of the vote: "[T]he Commission unanimously concludes that there is sufficient evidence of factual innocence to merit judicial review."¹⁶⁷

22. Three-Judge Panel Proceedings and Decision

Before the three-judge panel hearing commenced, Wake County District Attorney Colon Willoughby challenged the validity of Craig Taylor's confession in the media, stating Craig Taylor had a long history of physical and mental health problems and had confessed, implausibly, to more than seventy murders.¹⁶⁸ Greg Taylor's attorneys did not attempt to prove that Craig Taylor was the actual murderer, and his possible involvement was not part of the three-judge panel hearing.¹⁶⁹

164. Taylor Brief, *supra* note 62, at 292–93 (describing transformation from Craig Taylor as routine interviewee to alternate suspect); *id.* at 325–437 (transcript of four Craig Taylor interviews); Taylor Hearing Day 1 Transcript, *supra* note 75, at 301–57; Taylor Hearing Day 2 Transcript, *supra* note 89, at 12–65 (describing Craig Taylor interviews); *id.* at 168–214 (Professor Drizin's testimony regarding trustworthiness indicators of Craig Taylor's confession); *id.* at 205 (Commissioner Devereux stated, "I find Craig Taylor's testimony to be very persuasive.").

165. Taylor Hearing Day 2 Transcript, *supra* note 89, at 64–70 (testimony of Stellato).

166. *Id.* at 244.

167. See *State v. Taylor*, 91-CRS-71728, at 2 (N.C. Innocence Inquiry Comm'n Sept. 4, 2009), <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/OpinionTaylor.pdf> [<https://perma.cc/25Z8-ANGC>].

168. *Prosecutor Wants Proof of Innocence in Taylor Case*, ABC NEWS (Jan. 4, 2010), <http://abc11.com/archive/7200510/> [<https://perma.cc/TN4G-N26Q>]; see also Motion, *State v. Taylor*, 91-CRS-71728, (N.C. Super. Ct. Jan. 4, 2010), <http://dig.abclocal.go.com/wtvd/gregtaylor010410.pdf> [<https://perma.cc/ML7D-4FYZ>].

169. *Attorney: Evidence Never Linked Taylor to Murder*, WRAL (Feb. 9, 2010), <http://www.wral.com/news/local/story/6990180/> [<https://perma.cc/5LWS-96YL>] (noting that

Taylor's lawyers instead presented the testimony of government informants who had given the police incriminating information—Eva Kelly and Ernest Andrews, who had testified at trial, and Shelia Crowder, who had not. Kelly and Crowder both testified that they saw the victim getting into Taylor's vehicle, but their stories had two problems. First, they were fundamentally inconsistent in where and how these events happened.¹⁷⁰ Second, Crowder's testimony conflicted with the physical evidence, and Kelly's testimony was inconsistent with Crowder's and the other evidence on timing, and perhaps, involved her seeing Taylor and Beck with Avery-Ray rather than the victim.¹⁷¹ Andrews stuck to his trial testimony.¹⁷² His testimony also had two problems. First, it was inconsistent and implausible in how and why Taylor confessed in a crowded, public area of the jail to a complete stranger. Second, his claim that Taylor said the victim's throat was slit was inconsistent with her actual blunt-trauma injuries by a baseball bat or two-by-four, which the actual killer would have known. With full consideration of the motivations, inconsistencies, and lack of corroboration, the incriminating claims of the informants did not disappear. However, their stories were laid bare as highly unreliable, at best.

Both Greg Taylor and Johnny Beck testified. They told of that evening's drug binge and denied any contact with the victim. The prosecution presented nothing about what they had said or done in

in his statements to the judges, Taylor's attorney Joe Cheshire never mentioned evidence regarding Craig Taylor's confession that was part of the evidence before the Commission).

170. Compare Taylor Hearing Day 1 Transcript, *supra* note 75, at 248 (recounting that Crowder told the police that the victim got into the truck at about 12:30 a.m. when she was at the cab stand), with Taylor Brief, *supra* note 62, at 28 (recounting Kelly stating that the victim got into Taylor's vehicle in a much different way and at a different location), and Taylor Hearing Day 1 Transcript, *supra* note 75, at 45–46 (recounting the same).

171. See Dan Bowens, *SBI Agent: No "Scientific Certainty" About Blood Test Results in Taylor Case*, WRAL (Feb. 12, 2010), <http://www.wral.com/news/local/story/7012120/> [<https://perma.cc/YAC7-CWXN>] (describing Eva Kelly Hitch's confusion about the timing of events and the suggestion she was confusing the victim with Barbara Avery-Ray as the woman she saw in her house with Taylor and Beck); Mandy Locke, *Sober Witnesses Tell Fuzzy Stories*, NEWS & OBSERVER (Raleigh), Feb. 16, 2010, at 1B (noting that while Crowder said the victim got into the backseat of the truck, a photo taken by the police showed the backseat was folded down and covered in beach equipment and other sporting goods).

172. See *Witness Stands by Testimony at Taylor Hearing*, *supra* note 143 ("Superior Judge Howard Manning, who heads the panel, pointed to Taylor and said to Andrews that Taylor had been in prison 'in large measure, upon your sworn testimony . . . Are you sticking with your sworn testimony today?' 'Yes, sir,' Andrews replied. 'You're not taking it back in any way?' Manning asked. 'No, sir.'").

the years since 1991 that challenged their testimony.¹⁷³ Also, Barbara Avery-Ray testified about picking the two men up around 3:00 a.m., noticing no blood on them, and taking them to East Street, where the three of them went into a house where drugs were used, observing two blonde women there, and remaining with them until she dropped both of them off after daylight. According to her testimony, she was with the men from 3:00 or 3:30 a.m. until 6:30 or 7:00 a.m. She acknowledged in her testimony that she had not told either the police or the Commission investigators that she had gone into the house, but was telling the truth and was doing so because she knew this was a serious matter, had a different life now, and she wanted to be guilt free.¹⁷⁴

The central focus of the hearing was, however, the evidence that allegedly showed blood on Taylor's truck,¹⁷⁵ and more specifically the lab work done by the SBI Crime Lab and Dwayne Deaver. The process of exposing that Deaver had done additional tests, which were not disclosed when Taylor was convicted, began with the Commission's requests for forensic reports and supporting documents. Deaver's conflicting testimony before the Commission was clarified during his testimony at the three-judge panel hearing. At that hearing, Deaver testified that he had performed tests to confirm the presence of blood on the two samples taken from the truck that had yielded preliminary positive tests. The confirmatory tests were all negative.¹⁷⁶ Nevertheless, the SBI report he signed still indicated the presence of blood on its report, which had been a major part of the prosecution's proof at trial.

The existence of these tests and their negative results had not been made available to the prosecution at Taylor's trial. Deaver testified that he did not report the negative findings based on orders

173. See Mandy Locke, *'I Had Truth on My Side,' Inmate Says*, NEWS & OBSERVER (Raleigh), Feb. 10, 2010, at 1A (recounting Taylor's testimony and the prosecutor's cross-examination); Mandy Locke, *Recalling Ill-Fated Night, Pal Says Taylor is Innocent*, NEWS & OBSERVER (Raleigh), Feb. 12, 2010, at 1B [hereinafter Locke, *Ill-Fated Night*] (describing Johnny Beck's testimony and the prosecutor's challenge that details had changed from his statements to the police).

174. Transcript of Three-Judge Panel Hearing at 612–20, *State v. Taylor*, 91-CRS-71728 (N.C. Super. Ct. Feb. 11, 2010) [hereinafter Three-Judge Panel Hearing Transcript] (on file with the *North Carolina Law Review*).

175. An expert testified that the police misinterpreted the bloodhound's actions and that the dog was likely suggesting the exact opposite. See Locke, *Ill-Fated Night*, *supra* note 173, at 1B.

176. Three-Judge Panel Hearing Transcript, *supra* note 174, at 933–34 (containing testimony of Deaver indicating negative results of the Takayama tests on Items 16 and 18 and a negative result on Ouchterlony for Item 18).

by his superiors at the SBI Crime Lab.¹⁷⁷ While he tried to claim that the negative test results were due to insufficient sample size, which did not establish the absence of blood, Deaver had to admit there was no scientific certainty of there being blood.¹⁷⁸ As described above, the supporting evidence of the informants was in tatters, but more importantly, by the end of Deaver's testimony, the centerpiece of the prosecution's case—the blood evidence—had not only effectively disappeared, but had revealed implicit deception by the state's forensic officials.

The lack of any indication of blood on Taylor, Beck, and Taylor's Pathfinder moved from the absence of proof of guilt to evidence of innocence with the testimony of Tom Bevel, an expert in blood stain analysis, and Gregg McCrary, an expert in crime scene analysis. Their testimony showed that the victim's body had been moved considerably after having received wounds and the cumulative infliction of wounds and manipulation of the body made it highly likely that the perpetrator or perpetrators would have substantial amounts of blood on them or in any vehicle in which they or the body had been present.¹⁷⁹ In addition to the impact on the evidence in the case, many observers were shocked by the scientifically invalid and biased practices employed by the SBI.¹⁸⁰

Willoughby fought to the end against Taylor's exoneration. He argued to the judges that Taylor had not proved his innocence and urged them to not base their decision on how his office had initially prosecuted the case.¹⁸¹ Willoughby may have been correct that there

177. *Id.* at 947–49 (stating the failure to report negative results was SBI policy).

178. See Mandy Locke, *Agent Defends Test for Blood*, NEWS & OBSERVER (Raleigh), Feb. 13, 2010, at 10A; Mandy Locke, *In Taylor Case, Blood Is the Issue*, NEWS & OBSERVER (Raleigh), Feb. 11, 2010, at 1A; Mandy Locke & Joseph Neff, *SBI Agent Deaver Likely to Face Judge*, NEWS & OBSERVER (Raleigh), Oct. 2, 2010, at 1B (describing statements Deaver made to Montgomery-Blinn in preparation for the Commission hearing); see also Complaint at 7–8, Taylor v. Deaver, 5:11-cv-00341H (E.D.N.C. Sept. 5, 2013) (describing negative Takayama tests on Items #16 and #18 indicating substance was not blood and negative Ouchterlony indicating no human blood); *id.* at 15 (describing prosecutor Ford's first discovery of bench notes showing negative tests in August 2009 in preparation for Commission hearing).

179. Three-Judge Panel Hearing Transcript, *supra* note 174, at 302–34 (testimony of Bevel); *id.* at 438–61 (testimony of McCrary).

180. See, e.g., Paul C. Giannelli, *The North Carolina Crime Lab Scandal*, 27 CRIM. JUST. 43, 43–45 (Spring 2012).

181. See Mandy Locke, *Historic Steps Lead Taylor to Freedom after 17 years*, NEWS & OBSERVER (Raleigh), Feb. 18, 2010, at 1A; see also Dan Bowens, *SBI Agent: No "Scientific Certainty" About Blood Test Results in Taylor Case*, WRAL (Feb. 12, 2010), <http://www.wral.com/news/local/story/7012120/> [<https://perma.cc/9CTW-2659>] (admitting to lack of "scientific certainty"). Former Supreme Court of North Carolina Chief Justice I. Beverly Lake, Jr., who launched the process that led to the creation of the Commission,

was no unchallengeable affirmative evidence of Taylor's innocence; however, no substantial evidence of guilt beyond the location of Taylor's truck remained. Realistically, looking outside of the pure innocence issue, whether it was possible for Taylor's conviction to stand under traditional challenges was highly unlikely. The misrepresentation of the forensic results regarding the presence of blood on Taylor's Pathfinder provided strong grounds for a successful *Brady* challenge to the conviction,¹⁸² and the evidence, all of it subject to major challenge, remained available for any retrial. The three judges voted unanimously that Taylor had established his innocence by clear and convincing evidence, and he was released.¹⁸³ Like the Commission opinion that authorized judicial review, the three-judge panel recited only the evidence considered and the three affirmative votes of the judge that Taylor had "proved by clear and convincing evidence that [he] is innocent . . ."¹⁸⁴ After its two initial proceedings in which relief was denied,¹⁸⁵ the first Commission inquiry that led to exoneration was appropriately celebrated as vindicating a new model.¹⁸⁶

told a newspaper reporter at the beginning of the hearing that Willoughby was one of a handful of members of the study commission who voted against formation of the Commission. Lake thought Willoughby found it hard to approach the innocence proceeding as anything but adversarial. Ruth Sheehan, *He Fought to Fix Wrongs*, NEWS & OBSERVER (Raleigh), Feb. 10, 2010, at 1A. After the ruling, Willoughby did apologize to Taylor and said he wished the prosecution "had had all this evidence in 1991." See Robbie Brown, *Judges Free Inmate on Recommendation of Special Innocence Panel*, N.Y. TIMES (Feb. 17, 2000), http://www.nytimes.com/2010/02/18/us/18innocent.html?_r=0 [<https://perma.cc/3FDB-63T9>].

182. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring that the prosecution provide the defense with evidence favorable to the defendant that is material to guilt or punishment).

183. See Three-Judge Panel at 3, *State v. Taylor*, 91-CRS-71728 (N.C. Super. Ct. Feb. 17, 2010), <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/Taylor%203%20judge%20panel%20decision.pdf> [<https://perma.cc/TFC8-VL6G>]. On May 21, 2010, Governor Bev Perdue pardoned Taylor. See Tate, *supra* note 21, at 546.

184. See Three-Judge Panel, *supra* note 183, at 2.

185. See *supra* note 1 (noting that in 2008 the three-judge panel unanimously voted to deny relief in the Henry Reeves case and in 2009, the Commission unanimously voted in the Terry McNeil case that the evidence was insufficient to warrant judicial review).

186. See Brown, *supra* note 181 (quoting Barry C. Scheck, director of the New York Innocence Project: "North Carolina's 'commission is an important model for the adjudication of innocence claims . . . [in that in] the American court system, there are normally procedural bars that get in the way of litigating whether someone is innocent or not'" and summarizing reaction of Stephen B. Bright of the Southern Center for Human Rights that while much national attention is focused on DNA exonerations, 90% of criminal cases, like Taylor's, do not involve any DNA evidence).

B. The Kenneth Kagonyera and Robert Wilcoxson Case

The Kenneth Kagonyera and Robert Wilcoxson case is one of the Commission's richest and most interesting. In it, multiple defendants confessed and implicated their co-defendants. Ultimately, four of the six men charged entered pleas of guilty to second-degree murder and a fifth pled guilty to conspiracy to commit armed robbery. The defendants faced the incriminating statements of their co-defendants and were encouraged to plead guilty by defense counsel to avoid the possibility of a murder conviction at trial and with it an extremely harsh sentence. The case has one lesson that strikes home to me as a former defense attorney. Many defense attorneys have handled cases that appeared to be lost causes and negotiated plea agreements that their clients reluctantly accepted. This case stands as a reminder that innocence is not necessarily obvious, and that missing innocence may be more likely for defendants who have some involvement in criminal activity—the innocent who are not innocents.

This case illustrates the important role the Commission has played in methodically seeking out evidence of innocence available in law enforcement files but has either been ignored or not fully analyzed. Additionally, the case demonstrates the resistance of the prosecution to evidence that challenges past determinations. Here, the Commission played a critical role in forcefully pushing forward to gather and re-examine evidence to determine whether the defendants were actually innocent despite their guilty pleas.

1. The Crime

On September 18, 2000, at about 11:35 p.m., three African American males wearing gloves and bandanas over their faces entered Walter Bowman's home in Fairview, North Carolina, which is a small community in the mountains of Western North Carolina near Asheville. They were armed with pistols and a shotgun. Shaun Bowman, Wanda Holloway, Shaun's girlfriend, and Tony Gibson, a friend, were in the living room watching Monday Night Football. Walter Bowman, Shaun's father, was in his bedroom with the door closed. Holloway ran into the kitchen, but was dragged back into the living room by one of the intruders. Walter Bowman opened the bedroom door but quickly closed it. The intruder with the shotgun fired through the bedroom door. He then kicked the door open and shouted that the man had been shot. The three intruders quickly left

the house and drove away. Walter Bowman, who had been wounded in the abdomen, died on the way to the hospital.¹⁸⁷

Holloway called the police and remained in the house, but Shaun Bowman and Gibson left quickly. Initially, Holloway told the police only she and Walter Bowman were present at the time of the robbery, but soon it was discovered that the two others had been present.¹⁸⁸ The reason later given for Shaun Bowman's departure was that he had outstanding arrest warrants for parole violations.¹⁸⁹ Another possible reason for his rapid departure was the hypothesis of the police and others in the community that the robbery was in fact directed at Shaun Bowman because he was believed to have large amounts of money and drugs in his possession.¹⁹⁰

2. The Initial Law Enforcement Investigation

In the days after the murder, the police made a critical mistake regarding one potential group of suspects. The mistake happened on September 20, two days after the murder, when the first of several Crime Stoppers tips came to the police. That tip named Robert Rutherford, Bradford Summey, and Lacy "J.J." Pickens, all of whom were African American, as the perpetrators.¹⁹¹ At this point, law enforcement obtained information that they believed undercut the

187. N.C. Innocence Inquiry Comm'n Brief at 3–4, 20, *State v. Kagonyera/Wilcoxson*, 00-CRS-65086, 00-CRS-65088 (N.C. Super. Ct. 2011) [hereinafter *Kagonyera Brief*], <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Kagonyera%20Brief%20Final%20PDF.pdf> [<https://perma.cc/N5C2-TPMV>] (case numbers listed respectively).

188. *Id.* at 20 (describing the second interview with Tony Gibson conducted on Sept. 20, 2000). In an interview on September 28, 2000, Holloway acknowledged that Gibson and Shaun Bowman were present at the time of the homicide. *Id.* at 41.

189. *Id.* at 3–4.

190. *See id.* at 35–36. In Teddy Isbell's statement to law enforcement on September 25, 2000, he learned that Shaun Bowman was holding a large amount of money and drugs. *Id.* at 35–36. Larry Williams' statement on September 26, 2000, contains a similar statement. *Id.* at 40 (Williams Sept. 26, 2000, sheriff's office interview report). Attorney Devereux described Shaun Bowman, along with Pickens and Summey, as "first string varsity drug dealers in Buncombe County." Transcript of Hearing Day 1 at 147, *State v. Kagonyera/Wilcoxson*, 00-CRS-65086, 00-CRS-65088 (N.C. Innocence Inquiry Comm'n Apr. 28, 2011) [hereinafter *Kagonyera Hearing Day 1*], <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/day1.pdf> [<https://perma.cc/G5FG-2WEH>] (case numbers listed respectively). Shaun Bowman was not located by investigators until more than a month later. *Kagonyera Brief*, *supra* note 187, at 3; *id.* at 59 (Bowman's Oct. 23, 2000, sheriff's office interview report).

191. *Kagonyera Brief*, *supra* note 187, at 18; *id.* at 155 (giving race of Pickens and Summey); *The North Carolina Innocence Inquiry Commission Hearing*, N.C. INNOCENCE INQUIRY COMMISSION (Apr. 28–29, 2011), <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Hearing%20PowerPoint%20-%20Kagonyera%20and%20Wilcoxson.pdf> [<https://perma.cc/EGV4-KWV3>] (depiction of Rutherford).

tip's plausibility. Written beside Pickens' name on the Crime Stoppers information form are the words "in custody since 9-14-00."¹⁹² This information was available from the Buncombe County detention center's computer records. However, as Commission investigators later discovered, the jail logs showed that Pickens was actually serving a sentence that only confined him on weekends. He left custody at 8:00 p.m. on Sunday, September 17, 2000, the day before Walter Bowman was murdered.¹⁹³ Rutherford, Summey, and Pickens were not investigated further as suspects.

Another group of six, all of whom were African American,¹⁹⁴ became the focus of investigators—Kenneth Kagonyera, Robert Wilcoxson, Aaron Brewton, Teddy Isbell, Damian Mills, and Larry Williams—and five of the six ultimately pled guilty.¹⁹⁵ On September 22, 2000, four days after the murder, the lead detective in the homicide investigation, George Sprinkle, attempted to stop Robert Wilcoxson's van, apparently in connection with the homicide investigation. However, the vehicle sped away and crashed during the police chase, with the driver and a passenger escaping on foot.¹⁹⁶ Wilcoxson told the Commission that he had drugs in his vehicle and fled out of instinct,¹⁹⁷ but the flight no doubt suggested consciousness of guilt regarding the homicide to the detective. The next day, September 23, 2000, both a woman picked up during a law enforcement raid and a Crime Stoppers tipper named Kenneth

192. Kagonyera Brief, *supra*, note 187, at 19.

193. Transcript of Hearing, Day 2 at 45–46, *State v. Kagonyera/Wilcoxson*, 00-CRS-65086, 00-CRS-65088 (N.C. Innocence Inquiry Comm'n Apr. 29, 2011) [hereinafter Kagonyera Hearing Day 2], <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/TranscriptDay2.pdf> [<https://perma.cc/D822-VK8R>] (case numbers listed respectively); Affidavit of Major Glen Matayabas, *State v. Kagonyera/Wilcoxson*, 00-CRS-65086, 00-CRS-65088 (N.C. Innocence Inquiry Comm'n Dec. 26, 2012) <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Handouts%20given%20to%20Commissioners%20during%20hearing%20web.pdf> [<https://perma.cc/KY2M-FST7>]; *id.* (Buncombe County Sheriff's Office Booking Report of Lacy Pickens).

194. Kagonyera Brief, *supra* note 187, at 44, 72 (Isbell's September 23, 2000, sheriff's office interview report and Mills' October 26, 2000, sheriff's office interview report, respectively); N.C. Innocence Inquiry Commission Hearing, Power Points, *supra* note 191 (depictions of Kagonyera, Wilcoxson, Brewton, and Williams).

195. Kagonyera Brief, *supra* note 187, at 11–12. Kagonyera, Wilcoxson, Williams, and Mills pled guilty to second-degree murder and Isbell pled guilty to conspiracy to commit armed robbery, but Brewton refused to plead guilty and the murder charges against him were ultimately dismissed. *Id.*

196. *Id.* at 22.

197. Deposition of Wilcoxson at 28, *State v. Kagonyera/Wilcoxson*, 00-CRS-65086, 00-CRS-65088 (N.C. Innocence Inquiry Comm'n Apr. 12, 2011), <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Wilcoxson%20Depo%20Transcript.pdf> [<https://perma.cc/CKX8-4UA5>] (case numbers listed respectively).

Kagonyera, Larry Williams, and Aaron Brewton as being involved in the Bowman homicide.¹⁹⁸

On September 25, 2000, Matt Bacoate, the head of a local drug treatment program, contacted the sheriff's office regarding Teddy Isbell, a participant in his program, to arrange an interview of Isbell concerning the murder. Bacoate ultimately received some reward money for making this contact.¹⁹⁹ During two interviews with Isbell, the first at the drug treatment program and the second at the sheriff's department, he gave varying versions of his knowledge of the crime. First, he said he provided Kagonyera with a shotgun the day of the murder, which Kagonyera wanted for protection against an armed man looking for him in connection with a burglary of that man's apartment. Isbell assumed the shotgun was the one used in the Bowman murder. He also admitted to being present during the crime, but then claimed that he only participated in planning a robbery. He named Kagonyera, Wilcoxson, and Williams as being involved in the crime.²⁰⁰

The next day, one of the alleged participants, Larry Williams, gave a statement while in custody, in which he implicated Kagonyera, Wilcoxson, and Brewton in the homicide. In the first telling, Williams stated he was present outside the residence when the murder occurred, but later stated he lied about being present and had instead gotten out of Wilcoxson's van, in which they were traveling, prior to the homicide.²⁰¹ A couple weeks later, on October 11, 2000, Williams

198. Kagonyera Brief, *supra* note 187, at 28, 32.

199. The involvement of Bacoate in various parts of the investigation is one of the mysteries of this case. Bacoate testified that he received a reward of \$200 to \$300 for his role in bringing Isbell to authorities. Kagonyera Hearing Day 2, *supra* note 193, at 24. Brewton claimed that Bacoate required a payment of \$10,000 to help secure the resolution of his case. Kagonyera Hearing Day 1, *supra* note 190, at 412. Bacoate testified that he only received program fees, which was a small amount. Kagonyera Hearing Day 2, *supra* note 193, at 33.

200. Kagonyera Brief, *supra* note 187, at 34–37. After his statement, Isbell was charged with possession of a firearm by a felon. *Id.* at 37. On September 28 during another interview, Isbell stated he had lied in his earlier statement. He repeated elements about planning a robbery of Shaun Bowman and providing a shotgun, but attributed knowledge of the crime only to a statement by Williams to Isbell identifying Kagonyera as the shooter and Williams as being involved. *Id.* at 44 (Isbell Sept. 28, 2000, sheriff's office interview report).

201. *Id.* at 39–40. Sheriff Bobby Medford and District Attorney Ron Moore were present during this interview. *Id.* at 39.

In his testimony at the three-judge panel hearing, Williams gave an explanation for why he confessed to being involved. He said that Sheriff Medford painted a detailed picture of the circumstances of the Bowman murder, insisting that Williams was in Wilcoxson's van when others went inside. Williams had been with Kagonyera and Wilcoxson that night and smoked marijuana. He said Medford "made me think I didn't

also implicated Damian Mills in the homicide, telling detectives during an interview that he had heard in jail that Mills was also involved in the murder.²⁰²

On October 23, 2000, detectives interviewed Shaun Bowman, who had been arrested on unrelated charges. Bowman told them four men were involved. He identified Aaron Brewton, who was the only one of them that he personally knew, from a lineup. He knew the other three—Kagonyera, Williams, and Wilcoxson—from “the streets.” Bowman said that Kagonyera came through the door with the shotgun but he thought Wilcoxson was the triggerman.²⁰³

On October 24, 2000, Kagonyera, Wilcoxson, Isbell, Mills, Brewton, and Williams were charged with the first-degree murder of Walter Bowman. Over the next two days Williams and Mills gave confessions to sheriff deputies implicating themselves and the four others in the homicide. Williams’ seventh statement, which was given that day, illustrated the chaotic nature of the information provided by many of the suspects. In that statement, Williams altered the degree of his involvement from his previous versions. However, perhaps the most interesting new wrinkle was his description of how the men traveled to and from the Bowman home. Williams said they used two vehicles, Kagonyera’s blue car, driven by Isbell, and Wilcoxson’s van, which Wilcoxson drove. Also, after they left the Bowman home, Williams, who was in the van, thought he saw Kagonyera’s car turn into an Amoco service station.²⁰⁴ The variance between the confessions of different defendants as to what vehicles were used was striking. This is highlighted by the notably different version given by defendant Mills, which is discussed just below. Williams’ mention of the Amoco service station was also particularly significant since law enforcement investigators had obtained its surveillance video showing

remember . . . He made me think I was asleep in the van.” *Convict Recounts Coercion*, ASHEVILLE CITIZEN-TIMES, Sept. 20, 2011, at B1.

202. Kagonyera Brief, *supra* note 187, at 48. Damian Mills was also potentially connected to the crime by an ATF agent who informed detectives that Mills had purchased a shotgun similar to the one described as being used in the murder. *Id.*

203. *Id.* at 59–62 (containing Bowman’s Oct. 23, 2000, sheriff office interview reports and statement form which shows that Kenny, Larry, and Detroit were the “street names” he provided).

204. *Id.* at 11, 64–66. When shown a picture of the vehicle from the surveillance video at the Kounty Line-Reynolds Amoco, Williams stated it was not of Kagonyera’s vehicle, which had a different shape, was a single color, and had different wheels. Kagonyera Hearing Day 1, *supra* note 190, at 434. Three days later on October 27, 2000, Williams requested another interview and first confessed and implicated himself but then recanted and said he and Wilcoxson were not present. Kagonyera Brief, *supra* note 187, at 76–78 (including Williams Oct. 27, 2000, sheriff’s office interview report).

three black men arrive there at roughly the time of the crime in a vehicle that they believed was Kagonyera's blue Chevrolet Impala. Under further investigation by the Commission, the car in the surveillance video was determined to be a different make and model and the video evidence, instead of being incriminating as law enforcement investigators believed, became exculpatory and pointed to other perpetrators.

In his third interrogation on October 26, 2000, Mills confessed and implicated four of the others. His statement noted that the men traveled to the crime scene in one car, and was complete with descriptions of where each man sat. He said he was picked up by Kagonyera who was driving his blue Impala. Brewton was in the front passenger seat, and Mills got in the rear seat on the passenger side, with Williams sliding over to the center beside Wilcoxson. Mills said he acted as a lookout, remaining in the car, and that Brewton was the triggerman.²⁰⁵

3. Jailhouse Informants

Six jailhouse informants implicated various combinations of the six men ultimately charged with the homicide.²⁰⁶ Because the case did not go to trial, what credence law enforcement investigators gave

205. Mills said in his statement that when the men returned, Kagonyera, Wilcoxson, and Williams were yelling at Brewton for shooting "that man" with Brewton responding that "I did what I had to do to get us out of there." Kagonyera Brief, *supra* note 187, at 71–74 (including Mills Oct. 26, 2000 sheriff office interview report). In his statement, Mills also confesses to being the lookout for Kagonyera and Brewton in a burglary in Pisgah View Apartments. *Id.* at 74. This is apparently the burglary committed on the morning of September 18, 2000, for which Kagonyera and Brewton were arrested a few days later.

206. *Id.* at 51, 54. On October 18, 2000, a jailhouse informant, Millis Bryson, described incriminating statements made to him by Williams and Kagonyera. The statement by Kagonyera identified Wilcoxson, Williams, and Isbell as the others involved in the homicide. *Id.* (Informant's Oct. 18, 2000, sheriff's office interview report). On October 25, another jailhouse informant, Glenda Belton, gave a statement that the night of the murder Wilcoxson attempted to pass a "hot gun" to her. *Id.* at 51, 55 (Belton's Oct. 25, 2000, sheriff's office interview report). On February 27, 2001, Derrico Jordan told detectives that Williams, Wilcoxson, and Jerome Mooney admitted involvement in the murder. *Id.* at 86–95 (Jordan's Feb. 27, 2001, sheriff's office statement forms and notes). On March 6, 2001, Ricky Rizk spoke to officers confirming Wilcoxson's confession made to Jordan. *Id.* at 86, 96–97 (Rizk's Mar. 6, 2001, sheriff's office statement form). On September 18, 2001, Tyrell Dickey told detectives that Kagonyera, Wilcoxson, Williams, and Brewton came to his house and Kagonyera confessed. *Id.* at 86, 98 (Dickey's Sept. 18, 2001, sheriff's office statement form). On September 9, 2002, Randy Hodges told detectives that Kagonyera and Mills both independently confessed to him. *Id.* at 86–87, 99 (Sept. 9, 2002, memo from LB. Raymond). By this date, both men had entered pleas of guilty. *Id.* at 12.

these statements was not indicated,²⁰⁷ and as a result, further examination of these informants by the Commission is largely ignored.²⁰⁸

4. Physical Evidence

Ultimately, much of the evidence correcting the investigative error in this case came from forensic analysis. Although it took years to accomplish, key pieces of evidence on which the analysis was ultimately conducted were recovered not long after the Bowman murder. On September 19, 2000, sheriff's officers collected a surveillance videotape from the Kounty Line-Reynolds Amoco that showed a vehicle with three black males enter the store at 11:19 p.m. on September 18, 2000.²⁰⁹ That same day, a mail carrier found three bandanas and four gloves along the road near the Bowman home.²¹⁰ On September 22, 2000, a vehicle owned by Wilcoxson was seized after a police chase for potentially having evidence relevant to the homicide.²¹¹ On October 6, 2000, sheriff's deputies searched and subsequently seized a light blue four-door 1983 Chevrolet Impala parked at Kagonyera's grandmother's home.²¹²

DNA testing conducted by the SBI in 2000 of the bandanas and gloves revealed a full DNA profile on one bandana and a partial DNA profile consistent with a mixture from the second bandana. The DNA from the first bandana did not match the victim or any of the six suspects. The victim's and the codefendants' DNA was not present in the mixture on the second bandana. According to defense

207. For example, when asked about Glenda Belton's statement that he tried to give her a "hot gun" on the night of the crime, Wilcoxson responded "Why would I try to give a crack-head a gun?" Deposition of Wilcoxson, *supra* note 197, at 34. Since the handgun Belton described was not the murder weapon and was not used in the crime, her statement would likely have been discarded from evidence.

208. Commission investigators did attempt to track down these informants and investigate their information. Nothing learned created any corroboration for their statements. In some instances, for example Tyrell Dickie's version of events provided during the telephone interviews was inconsistent with his statement made to law enforcement. Kagonyera Hearing Day 2, *supra* note 193, at 251. Furthermore, in his deposition, Wilcoxson stated that he does not know a Tyrell Dickie and had never been to his house. Deposition of Wilcoxson, *supra* note 197, at 38. Kagonyera also stated that he does not know a man by that name either. Deposition of Kagonyera at 75, State v. Kagonyera/Wilcoxson, 00-CRS-65086, 00-CRS-65088 (N.C. Innocence Inquiry Comm'n Apr. 12, 2011), <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Kagonyera%20Depo%20Transcript.pdf> [<https://perma.cc/537B-DVMU>] (case numbers listed respectively).

209. Kagonyera Brief, *supra* note 187, at 17–18.

210. *Id.* at 18.

211. *Id.* at 22.

212. *Id.* at 47.

attorneys, the negative results regarding the suspects' DNA were not provided to defense counsel.²¹³ Testing of Wilcoxson's van by the SBI was inconclusive for blood. No DNA testing was attempted at that time.²¹⁴ No physical evidence was reportedly recovered from Kagonyera's car.²¹⁵

5. Initial Resolution of the Six Defendants' Homicide Charges

On June 2, 2001, Damian Mills was the first of the co-defendants to enter a guilty plea. He pled guilty to second-degree murder, attempted armed robbery, and conspiracy to commit armed robbery. Like several of the others, he attempted to withdraw his plea, filing two pro se motions, which were denied.²¹⁶ Mills received a sentence of 120 to 153 months.²¹⁷

On November 30, 2001, Kagonyera, with his attorney present, was interviewed by District Attorney Ronald L. Moore and confessed to the crime.²¹⁸ On December 13, 2001, Kagonyera became the second co-defendant to plead guilty, pleading guilty to second-degree murder in the Bowman homicide, an unrelated felony assault, breaking and entering, drug possession, and dog fighting.²¹⁹ At the sentencing hearing, but before the sentence was announced, Kagonyera moved to withdraw his guilty plea. His motion was denied.²²⁰ He received a consolidated sentence on all convictions of 144 to 182 months.²²¹

Larry Williams entered a plea to second-degree murder on February 25, 2002. He received a sentence of 100 to 129 months.²²²

Teddy Isbell was next, entering an *Alford* plea²²³ to accessory after the fact for first-degree murder on March 28, 2002. However, he

213. Kagonyera Hearing Day 1, *supra* note 190, at 136–37. Attorney Devereux, one of Kagonyera's attorneys, testified that he did not receive the information about the DNA exclusion. *Id.* In his testimony at the three-judge hearing, Devereux testified that he believed if he had had this report and shown it to Kagonyera he would never have entered a guilty plea. *See Testimony Recounts Murder Admissions*, ASHEVILLE CITIZEN-TIMES, Sept. 16, 2011, at B1.

214. Kagonyera Brief, *supra* note 187, at 85.

215. *Id.* at 47.

216. *Id.* at 100 (stating that motions were denied on September 7 and September 9, 2002).

217. *Id.* at 100, 122 (stating that sentencing occurred on September 10, 2002).

218. *Id.* at 100–01.

219. *Id.* at 102. The breaking and entering conviction was of a Pisgah View apartment in which Linda Bethea resided that was committed on the morning of September 18, 2000, along with Brewton. *Id.* at 102, 126.

220. *Id.* at 122–25.

221. *Id.* at 102, 131 (sentencing on Sept. 10, 2002).

222. *Id.* at 106, 145 (sentencing on Sept. 10, 2002).

moved to withdraw his guilty plea. Over a year later on December 11, 2003, after additional motions and a mental competency evaluation, Isbell entered another guilty plea, this time to conspiracy to commit armed robbery. He received a sentence of sixty-six to eighty-nine months.²²⁴

Robert Wilcoxson was the last of the five to plead guilty. On August 15, 2002, he entered a guilty plea to second-degree murder. He was sentenced to 150 to 189 months in prison.²²⁵

On August 26, 2002, the homicide charge against Aaron Brewton was dismissed. The district attorney stated that he did not have evidence to proceed with the first-degree murder charge, but reserved the right to prosecute if other evidence became available. Brewton entered a guilty plea to an unrelated breaking and entering charge.²²⁶

6. New Evidence

a. *Robert Rutherford Confession*

On March 27 and 28, 2003, while incarcerated in federal prison in Manchester, Kentucky, Robert Rutherford—who was one of the three individuals named in the first Crime Stoppers tip—called federal Drug Enforcement Administration Agent Barry Whiteis and confessed to his involvement in the Bowman murder. In his testimony at the three-judge panel proceedings, Whiteis testified that he attempted in his conversation to obtain details that only a perpetrator would know in part because receiving such a confession was so unusual: “I had never received a call [from] a federal inmate wanting to confess to a homicide.”²²⁷ Rutherford, who had previously been an informant for Whiteis, stated he committed the crime along with Bradford Summey and Jay Pickens, the other two names given in the initial Crime Stoppers tip. Rutherford stated that Pickens carried the

223. An *Alford* plea is one in which the defendant pleads guilty without admitting guilt. See *North Carolina v. Alford*, 400 U.S. 25, 38–39 (1970).

224. Kagonyera Brief, *supra* note 187, at 146–47.

225. *Id.* at 106, 142 (sentencing on September 10, 2002).

226. *Id.* at 106–09. The breaking and entering conviction was of a Pisgah View apartment in which Linda Bethea resided that was committed on the morning of September 18, 2000 along with Kagonyera. *Id.* at 126.

227. See *Innocence Trial Starts*, ASHEVILLE CITIZEN-TIMES, Sept. 13, 2011, at A1. Why Rutherford would have made the confession is not known. He denied making it when interviewed by the Commission investigator. See Kagonyera Hearing Day 2, *supra* note 193, at 67–68. Likely it was a misguided effort to get some sentencing benefit for providing helpful information, although Whiteis told Rutherford he could not promise any time off for the information. Kagonyera Brief, *supra* note 187, at 153 (Agent Whiteis Mar. 28, 2003 report).

shotgun and Summey had a handgun. They traveled to Bowman's home in Pickens' blue 1970 Oldsmobile Cutlass, and on the way there they stopped at a store near Reynolds High School.²²⁸ Federal authorities sent this confession to the Buncombe County Sheriff's Office, which in turn directed the report to the District Attorney's Office in July 2003. Besides providing the document in discovery to Isbell, whose charges were still awaiting adjudication at that time, there is no indication that the prosecutor took any action based on this confession.²²⁹

b. Combined DNA Index System ("CODIS") "Hit" for DNA on Bandana

The full DNA profile recovered from a bandana found by the roadside near the Bowman home was entered into the FBI CODIS system for routine monthly queries. On March 28, 2007, there was a "hit" for Bradford Summey. In June 2007, Tim Baise, a forensic biologist at the SBI Crime Lab, telephoned the Buncombe County Sheriff's Office about the CODIS hit and spoke with Lieutenant John Elkins there, who told Baise that he would contact the district attorney and get back to him. Elkins did not call back.²³⁰ On October 1, 2007, the SBI sent a report regarding the CODIS hit on Summey to the Buncombe County Sheriff's Office, with a copy to the Buncombe County District Attorney.²³¹

In response to Kagonyera's pro se Motion for Appropriate Relief filed on July 30, 2008, which asked, inter alia, for DNA testing, the Buncombe County District Attorney agreed to conduct the test.²³² The response made no mention of the CODIS hit on Summey.²³³

228. Kagonyera Brief, *supra* note 187, at 152–56 (Agent Whiteis Mar. 28, 2003 report). Rutherford was generally correct in his memory of Pickens' car although off by one model year. According to official records, Pickens owned a 1971 two-door Oldsmobile Cutlass Supreme, and was pulled over while driving this car in June and July 2000. Kagonyera Hearing Day 2, *supra* note 193, at 154–55.

229. Kagonyera Brief, *supra* note 187, at 151.

230. Kagonyera Hearing Day 1, *supra* note 190, at 257–58; *see also* Innocence Inquiry Comm'n Hearing Handouts, State v. Kagonyera/Wilcoxson, 00-CRS-65086, 00-CRS-65088 (N.C. Innocence Inquiry Comm'n June 25, 2007) [hereinafter Comm'n Handouts] <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Handouts%20given%20to%20Commissioners%20during%20hearing%20web.pdf> [https://perma.cc/7236-X2UC] (case numbers listed respectively) (SBI Forensic Biology Section Telephone Log); *id.* (SBI Laboratory Report Oct. 1, 2007).

231. Kagonyera Hearing Day 1, *supra* note 190, at 260; *see also* Comm'n Handouts, *supra* note 230 (directing report to Detective Eddie Davis, Buncombe County Sheriff's Office with copy to Mr. Ronald L. Moore, D.A.).

232. Kagonyera Brief, *supra* note 187, at 171 (Moore's response).

233. *Id.* at 170–72.

Despite a court order being entered in response to this motion ordering testing,²³⁴ DNA testing was never completed. Rutherford was brought to the Buncombe County Detention Facility from federal custody in August 2008 to acquire his DNA. While there, he was interviewed about the murder by a sheriff's office detective at the request of the district attorney. Rutherford told the detective that he did have information about the *Bowman* case, but would only speak to the district attorney. The district attorney sent the detective back with the message that he was not interested in talking with Rutherford at that time but would look at any information gathered by the detective. Rutherford insisted on speaking face to face with the district attorney, saying "I'll tell him everything."²³⁵ The Commission could find no indication that the district attorney ever spoke with Rutherford while in Buncombe County.²³⁶ Rutherford remained in the Buncombe County Detention Center until April 2009 when he was returned to federal custody without his DNA ever being collected despite the court order.²³⁷

The district attorney and sheriff's office files provided to the Commission contained no reference to the CODIS hit.²³⁸ The Commission first learned of this critical information in mid-2010 when it received a copy of the SBI file after it began its formal investigation.²³⁹

7. Commission Investigation and Proceedings

At the beginning of the Commission hearing on Kagonyera and Wilcoxson's cases, Executive Director Montgomery-Blinn explained to the commissioners that they would hear accusations made against the district attorney, other individuals, and other agencies.²⁴⁰ She cautioned the commissioners that the district attorney had not been deposed or questioned about the allegations to avoid his recusal if the case was referred to the three-judge panel, and as to others, she stated that the allegations had been investigated only as they related directly

234. *Id.* at 169–73.

235. *Id.* at 174 (Rutherford's interview report of Sept. 19, 2008, of Rutherford by Detective Roney Hillard).

236. *Id.* at 173.

237. *Id.* at 175.

238. *Id.* at 157.

239. *Id.*; e-mail from Sharon Stellato, Assoc. Dir., N.C. Innocence Inquiry Comm'n, to Robert P. Mosteller, J. Dickson Phillips Distinguished Professor of Law, Univ. of N.C. School of Law (Sept. 3, 2015, 3:54 PM EST) (on file with the *North Carolina Law Review*).

240. Kagonyera Hearing Day 1, *supra* note 190, at 10.

to the innocence investigation.²⁴¹ As the facts are presented in this case, possible misconduct by the prosecution and law enforcement is described, as it is in a number of the other cases examined in this Article. For a number of reasons, including the absence of a full record or an official adjudication of these allegations and to maintain focus on the issue being examined in this Article—the work of the Commission in investigating and determining innocence, not procedural or constitutional violations that might warrant a new trial but not relief under Commission procedure—the misconduct issues are generally not resolved.²⁴² The information developed by the Commission investigation is provided as it bears on understanding how the system failures occurred in these cases and often helped both to obscure innocence and to produce erroneous convictions.

In August of 2008, years before these proceedings commenced, Kagonyera applied to the Commission, and in March 2010, his case was moved into formal inquiry. Only in late November 2010 after the discovery of the CODIS hit and other investigation did Wilcoxson apply, and his case was moved into formal inquiry in February 2011.²⁴³ Early in the hearing, Montgomery-Blinn noted that the governing statute requires the Commission to give priority to cases in which the claimant is incarcerated solely for the crime being challenged on factual innocence grounds, which did not apply to Kagonyera since he received a consolidated sentence based on multiple offenses.²⁴⁴ By the time of Wilcoxson's application, who was incarcerated only on the challenged conviction, the case already was receiving priority because of DNA results that excluded all the co-defendants as contributors to the DNA found on the gloves and bandanas.²⁴⁵ At that point, only Kagonyera and Wilcoxson remained in custody,²⁴⁶ and the

241. *Id.* at 10–11; *see also* N.C. GEN. STAT. § 15A-1469(a1) (2015) (providing that if the Commission concludes there is credible evidence of prosecutorial misconduct, the Chair may request appointment of a special prosecutor to represent the State rather than the district attorney).

242. *See supra* notes 18–19 and accompanying text.

243. Kagonyera Brief, *supra* note 187, at 177.

244. Kagonyera Hearing Day 1, *supra* note 190, at 11–12 (noting that while Kagonyera had entered pleas to multiple offenses and had received a single consolidated sentence on all of the charges, Wilcoxson was exclusively confined on this conviction); *see also* Comm'n Handouts, *supra* note 230 (containing Nov. 2, 2010, LabCorp Certificate of Analysis that excludes all defendants).

245. Kagonyera Hearing Day 1, *supra* note 190, at 12.

246. Kagonyera Brief, *supra* note 187, at 6–7 (reporting that Isbell was released in September 2006, Williams in July 2009, and Mills in October 2010).

Commission moved to a hearing on both of their cases, which was held on April 28–29, 2011.²⁴⁷

8. The DNA Evidence

Tim Baise of the State Crime Lab testified to further testing done after the CODIS hit for Summey on the gray bandana. He performed this testing in 2010 at the request of the Commission. The profile from the bandana fully matched Summey's DNA profile. Baise then completed a population statistics analysis and determined the probability of a random match at over one in one trillion.²⁴⁸ He also described the DNA testing done earlier by the SBI on the DNA profile from the second bandana. That profile, which is consistent with a mixture from multiple contributors, was compared with DNA from the victim and all six defendants. All of them were excluded as possible contributors.²⁴⁹

Shawn Weiss from LabCorp testified to additional testing done at the Commission's request in 2010 and 2011 on two red bandanas, two black gloves, and two brown gloves found near the crime scene.²⁵⁰ A mixture of DNA was found on both black gloves. All of the charged defendants were excluded as possible contributors of the DNA found on all the items. Summey and Rutherford were also excluded as to the DNA on the gloves, but Pickens could not be excluded as to partial DNA profiles recovered from both gloves. Although Weiss could give no numerical estimates of statistical significance, he reported that Pickens' profile and that on the gloves shared a relatively rare DNA marker.²⁵¹ As to a partial DNA profile found on one red bandana, all of the charged defendants and Pickens and Summey were excluded, but Rutherford could not be. Here, Weiss could compute the significance of the LabCorp results combined with additional markers obtained in earlier SBI testing.

247. *Id.* at 1.

248. Kagonyera Hearing Day 1, *supra* note 190, at 270–72; Comm'n Handouts, *supra* note 230 (July 26, 2010, SBI Lab Report).

249. Kagonyera Hearing Day 1, *supra* note 190, at 249–50.

250. *Id.* at 277. In 2010, the Commission also submitted the door panel from Wilcoxson's van to LabCorp for DNA testing to determine if the victim's DNA could be found. Only partial profiles could be obtained and they were either insufficient for comparison purposes or the victim's DNA could be excluded. *Id.* at 220–22, 298–302.

251. *Id.* at 280–86.

The random match probability among African Americans is 1 in 6,060.²⁵²

In summary, all the charged defendants were excluded as to the DNA recovered from the bandanas and gloves found near the crime. Summey's DNA profile and that on the gray bandana fully matched. Pickens' DNA profile shared a relatively rare marker with that on two of the gloves. Rutherford's DNA profile was consistent with a partial profile from the red bandana, with a relatively small probability of a random match, as noted above.

9. The Confession Evidence

All six defendants made multiple statements memorialized in law enforcement records. Many deny involvement in the homicide, then admit involvement, then recant portions or the entirety of the prior admission, and then admit guilt again, with different details. Listed in order of when they were first interrogated, Kagonyera made three statements, Brewton four, Williams eight, Wilcoxson two, Isbell three, and Mills three.²⁵³

The Commission sent these statements and Rutherford's statement to DEA Agent Whiteis to Professor Steven A. Drizin, a professor at Northwestern University School of Law and expert on false confession and confession reliability. Drizin's detailed report reached the conclusion that the statements of Kagonyera, Wilcoxson, Mills, Williams, Brewton, and Isbell were highly unreliable based on well-developed markers of false and unreliable statements. They are internally inconsistent, inconsistent with one another, and uncorroborated by verifiable outside information about the crime.²⁵⁴ With regard to inconsistencies with each other, Drizin listed numerous features, such as who had the idea for the robbery, who was armed and with what weapons, and what vehicles were used. He found the statements by the charged suspects comparable to the notorious set of confessions used to wrongfully convict the defendants in the "Central

252. Rutherford is African American. *See supra* text accompanying notes 194–195. Using only the LabCorp results, the random match probability for African Americans is 1 in 370. Kagonyera Hearing Day 1, *supra* note 190, at 286–88.

253. Kagonyera Brief, *supra* note 187, at 32–76.

254. Affidavit and Report of Steven A. Drizin at 26, *State v. Kagonyera/Wilcoxson*, 00-CRS-65086, 00-CRS-65088 (N.C. Innocence Inquiry Comm'n June 25, 2007) <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Drizin%20Affidavit%20%20Report%20web.pdf> [<https://perma.cc/W37W-PKYF>] (case numbers listed respectively) (opinions regarding reliability).

Park Jogger” case.²⁵⁵ He cited evidence and methods of contamination by outside sources that could have provided the facts set out in the statements rather than insider knowledge unknown to innocent individuals.²⁵⁶ Finally, none of the statements appeared to provide any new verifiable information to the police.²⁵⁷

Drizin found, by contrast, the confession of Rutherford far more reliable. Because the statement was made to a federal DEA agent who knew nothing about the Bowman homicide, it was impossible for the agent to provide contaminating factual information.²⁵⁸ The statement also was corroborated by independent unknown information—the DNA of Summey found on the bandana, the partial consistency of DNA found on gloves for Pickens and one of the bandanas for Rutherford,²⁵⁹ and other facts, including the 1971 Oldsmobile Cutlass Supreme two-door hardtop on the service station video.²⁶⁰

10. The Surveillance Video Evidence

On the day after the homicide, police obtained surveillance video from Kounty Line-Reynolds Amoco. The notation on the police property records indicated three black males coming into the station at around 11:19 p.m. on September 18, 2000.²⁶¹ This video appeared to

255. *Id.* at 24. The “Central Park Jogger” case involved the incredibly vicious sexual assault of a young woman jogging in Central Park in April 1989. The police obtained confessions from five boys, ranging in age from fourteen to sixteen years old, who were convicted largely based on their confessions. See Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 479–81 (2006). Professor Drizin is referring to the now recognized observation of the Manhattan District Attorney’s office, which reinvestigated the crime over a decade later after a man confessed and his DNA was indisputably linked to the crime, that the boys’ confessions diverged on almost every detail about how the crime occurred; these details were largely not corroborated by the known facts but were in many cases plainly wrong. *Id.* at 483.

256. Affidavit and Report of Steven A. Drizin, *supra* note 254, at 26. Beyond the sources of contamination he cited, both Kagonyera and Mills acknowledged that they used the discovery provided to them as sources of their statements. Kagonyera Hearing Day 1, *supra* note 190 at 96 (testimony by Kagonyera); *id.* at 398 (testimony by Mills). In his testimony, attorney Devereux acknowledged that his client could have used discovery to fashion his inculpatory statement to the prosecutor and discussed how he provided such information to his clients and that other defendants would also have had discovery available to them. *Id.* at 128–29.

257. Affidavit and Report of Steven A. Drizin, *supra* note 254, at 24.

258. *Id.* at 26–27.

259. *Id.* at 16.

260. *Id.* at 17–18.

261. Kagonyera Brief, *supra* note 187, at 17–18; Kagonyera Hearing Day 2, *supra* note 193, at 106.

be the source of Shaun Bowman's belief that Kagonyera's car was involved in the crime.²⁶² Indeed, when shown photos the Commission made from enhanced portions of the remaining video tape, Detective George Sprinkle, the lead detective on the case, stated that they were pictures of the vehicle he towed in,²⁶³ which was Kagonyera's blue Chevy Impala.²⁶⁴ Williams' statement to sheriff office investigators on October 24, 2000, also indicated that Kagonyera's car may have stopped at an Amoco station after the crime.²⁶⁵ The video took on different significance when Rutherford stated in his confession that the car in which he traveled to the crime stopped at a store near Reynolds High School, which describes the general location of the Amoco service station.²⁶⁶

When Commission investigators viewed this tape, they made a startling discovery. They saw that from 11:17 p.m. to 11:21 p.m.—virtually the entire time the car and suspects were at the station—the original video had been recorded over by a segment of *The Guiding Light* soap opera.²⁶⁷ Based on available transcripts, Commission investigators determined that the show was originally aired on October 23, 2000, which is the date listed on the evidence control form that Detective George Sprinkle turned the videotape over to the sheriff department's evidence custodian.²⁶⁸ The Commission

262. Kagonyera Hearing Day 2, *supra* note 193, at 109. Also, investigators showed witnesses from the gasoline station pictures of Kagonyera's car. *Id.* at 107–08.

263. *Id.* at 149.

264. The car was seized pursuant to a warrant on October 30, 2000. Kagonyera Brief, *supra* note 187, at 79.

265. *Id.* at 66.

266. *Id.* at 154.

267. What is to be made of this incredibly unfortunate destruction of evidence that appeared, before SBI efforts, to obliterate the entire relevant segment of the tape? Some Commissioners were concerned that it appeared potentially intentional. As one stated, “[I]f you attach a bad purpose behind removing the video, the person who did it, without the advanced enhancement techniques, would have thought they got the whole thing.” Kagonyera Hearing Day 2, *supra* note 193, at 136. Another possibility is simple ineptitude, which may be supported by the erasure leaving behind a datable segment of daytime television. At the three-judge panel hearing, Commission investigator Jamie Lau stated the best he could resolve the issue was that it remained unresolved. He testified that “he considered the erasure serious but was unable to determine how it occurred. He . . . was told by Sheriff Van Duncan it could have been accidental.” *Judges Watch Taped-Over Video*, ASHEVILLE CITIZEN-TIMES, Sept 15, 2011, at A1.

268. Kagonyera Hearing Day 2, *supra* note 193, at 110–13. It is unclear that anyone knew that the surveillance video had been taped over before Smith attempted to watch it. Devereux, one of Kagonyera's two attorneys, stated that he did not attempt to view the surveillance tape. *Id.* at 140–41.

investigators developed no clear explanation from sheriff's office personnel as to how the video was taped over.²⁶⁹

The Commission transferred the video tape to the SBI for enhancement and restoration. The SBI was not able to restore the segment that had been fully taped over, but was able to recover a few segments at the very beginning and the very end of the taped-over portion. It also was able to enlarge the pictures and slow down the tape to real-time speed.²⁷⁰ In the end, only a very small segment of the video of the car and men was available, and the men's faces were not sufficiently clear for any identification.²⁷¹ Based on the time of the 911 call, the video was likely recorded before the crime occurred rather than after it.²⁷²

The Commission contracted with an expert on American cars, John C. Flory, Jr., to determine if he could identify the automobile shown in the remaining surveillance video and from screen shots taken from the videotape. Based on features of the car visible in the video and pictures, he reached the opinion that car was either a 1971 or 1972 Oldsmobile Cutlass Supreme two-door hardtop. He further concluded that the car was definitely not a 1983 Chevrolet Impala four-door sedan.²⁷³ State automobile registration records show that Pickens owned a 1971 Oldsmobile Cutlass Supreme two-door Holiday Hardtop at that time and law enforcement records indicate that he was driving that car when stopped by police in both June and July 2000, a couple months before the murder.²⁷⁴

269. *Id.* at 115–17.

270. *Id.* at 116–18 (stating that among the possible explanations was Sheriff Duncan's observation that the equipment they had in 2000 would have recorded over inadvertently and knowing the two officers who may have been responsible for such inadvertent recording would be a possibility, but also reporting that Detective Sprinkle, who likely would have been the person responsible indicated there was no way he could have recorded over the video).

271. This videotape is available on the Commission website. *See Men at Car: State v. Kagonyera/Wilcoxson*, N.C. INNOCENCE INQUIRY COMM'N, <http://www.innocencecommission-nc.gov/kagonyera.html> [<https://perma.cc/8BEA-SF27>].

272. Kagonyera Hearing Day 2, *supra* note 193, at 127. The distance from the crime scene to the gas station is 5.9 miles. *Id.* *See* Comm'n Handouts, *supra* note 230 (Bowman Homicide, Critical Locations Map).

273. Affidavit and Report of John C. Flory, Jr. at 6–7, *State v. Kagonyera*, 00-CRS-65086 (Sept. 22, 2011), <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Flory%20Affidavit%20&%20Report%20web.pdf> [<https://perma.cc/M7Y7-V7RG>]. *See* Kagonyera Hearing Day 2, *supra* note 193, at 158–59.

274. Kagonyera Hearing Day 2, *supra* note 193, at 154–55.

11. Why Do Defendants Who Are Innocent Plead Guilty?

One of the big questions the Commission asked was why innocent individuals would confess to murder and plead guilty. The explanations given by the defendants in this case, all of whom maintained their innocence in conversations with Commission investigators, provided some insight. Each was based on an apparently rational assessment of their difficult situation as they perceived it. They wanted to cut their losses and avoid extremely long sentences after conviction at trial in an environment of hopelessness resulting from the mounting evidence against them. This evidence was the result of inculpatory statements by their codefendants who were seeking to curry the prosecutor's favor and the slim prospect of a strong defense by their lawyers.²⁷⁵

Mills, who was the first to plead guilty, said he was entirely innocent of the Bowman homicide, but explained to Commission investigators that he pled guilty because it was in his best interest and he did not want “to be made the triggerman,” which he felt law enforcement was trying to do.²⁷⁶ He, Kagonyera, and their lawyers met in a pivotal moment in Kagonyera's path to his guilty plea. Mills said that at that meeting he was explaining that he was not “going down” for whatever Kagonyera might have done.²⁷⁷

Williams told Commission investigators that his lawyer wanted him to plead and was not preparing a defense. He said that after two years in jail he finally gave up and entered the guilty plea. He explained that he was just a teenager and that his mother even induced him to take the plea.²⁷⁸

Wilcoxson said that he pled guilty because he was “stuck between a rock and a hard place.”²⁷⁹ In addition to the murder, he was facing charges for other crimes—fleeing to elude arrest, stolen property, and a drug charge, and his lawyer told him the prosecution would “boxcar those numbers,” meaning run the sentences consecutively. Those sentences would have amounted to over fifteen

275. See, for example, Williams' explanation of why he pled guilty. Kagonyera Hearing Day 1, *supra* note 190, at 432 (explaining that Williams pled guilty because he was young, did not understand how the system worked, and his mother was used to induce him to plea).

276. *Id.* at 396.

277. *Id.* at 399.

278. *Id.* at 432. Williams somewhat overstated the time he had been in jail when he entered his guilty plea. He entered his plea on February 25, 2002, Kagonyera Brief, *supra* note 187, at 106, which was roughly a year and a half after his arrest on September 24, 2000. *Id.* at 33.

279. Deposition of Wilcoxson, *supra* note 197, at 14.

years, and he then would still have the murder charge to fight. With the plea, the other charges would be dropped, he would face as little as ninety-four months in prison, and having already spent two years in confinement, he could be free in roughly five years. He had a newborn daughter, and he wanted to avoid the possibility of spending his whole life in prison.²⁸⁰

Kagonyera's case provided the most nuanced explanation of the process, giving a view from both the perspective of the defendant and one of his attorneys, Sean Devereux, who is an experienced death penalty defense attorney.²⁸¹ Although differing because of the positions of the two in the process, the accounts are quite consistent regarding the progression of events.

Kagonyera gave the following explanation of his guilty plea:

I kind of felt like my lawyers didn't have my best interests because at every . . . visit was never like we're here to prepare a defense . . . for you. It was like, well, we're coming and some—so and so said this. Why would they say this? . . . [T]hey were constantly trying to find ways to coerce me . . . or force me into taking a plea, you know. They would . . . set up the visit with me and one of my co-defendants, which was my cousin, Damian Mills . . . [H]im and his lawyer . . . wanted me to adopt what they were saying as say well, you need to do this and take a plea bargain or you're going to get a life sentence. I promise you we're gonna . . . testify against you . . . ”²⁸²

Attorney Devereux explained that multiple defendant cases like the Bowman homicide often followed a pattern where some of the defendants are given an opportunity to be witnesses and others, typically the most culpable, become the defendants. There's generally a race to be among the witness group.²⁸³ Early in the process, he decided that the case “ought to plead out.”²⁸⁴ Given that it was

280. *Id.* at 14–15. Wilcoxson noted later in the deposition that he got sentenced in a higher range than conversations with his lawyer had led him to expect. *Id.* at 17.

Isbell was also facing other charges and similarly he explained that Isbell the conspiracy to commit robbery plea he took gave him less jail time than he could have gotten for being a felon in possession of a firearm of which he was clearly guilty. Kagonyera Hearing Day 1, *supra* note 190, at 364.

281. *Id.* at 89–90.

282. Deposition of Kagonyera, *supra* note 208, at 34. Kagonyera said that an *Alford* plea—one in which he did not admit guilt—was not an option made available to him and explained that he fashioned his admission to the prosecutor, which was required for the plea deal, from discovery materials he received. Kagonyera Hearing Day 1, *supra* note 190, at 128; *see also supra* text accompanying note 223.

283. Kagonyera Hearing Day 1, *supra* note 190, at 96.

284. *Id.* at 114.

charged as a capital case and Kagonyera had other charges pending, Devereux felt that wrapping it all up for a second-degree murder plea was a good deal.²⁸⁵ He said he did work on a plan for the defense, and some of the meetings with defendants were for the purpose of finding others who supported Kagonyera's position and were willing to go to trial.²⁸⁶ However, no theory he developed held up in the face of a continuous flow of new incriminating statements by co-defendants.²⁸⁷

Devereux saw the meeting between Kagonyera and Mills as a turning point. Kagonyera had seen the discovery material in which Mills incriminated Kagonyera, but believed Mills would not make the same incriminating statements in person and instead would corroborate Kagonyera's innocence.²⁸⁸ At the meeting, Mills repeated the same basic story contained in his statements that supported Kagonyera's guilt.²⁸⁹ Devereux said Kagonyera was strongly affected and may have just given up.²⁹⁰ His admission of guilt to the prosecutor and guilty plea followed shortly thereafter.²⁹¹

12. Shaun Bowman's Identification of Brewton, Kagonyera, Wilcoxson, and Williams

The Commission interviewed Shaun Bowman to try to ascertain the basis and certainty of his identification of four of the defendants as intruders. At the time of the Commission interview, the understanding that he conveyed was that he was unsure whether Kagonyera entered his home. He explained that "after the night of the homicide he learned information about these individuals and decided they were the individuals that came into the home that night, and that's when he made those statements to the police."²⁹² One of the pieces of information that led him to identify Kagonyera was that "they had... Kenneth Kagonyera's car on a security video."²⁹³ Bowman told Commission investigators that he had not been shown

285. *Id.* at 116–17.

286. *Id.* at 123–26.

287. *Id.* at 168–74.

288. Kagonyera Hearing Day 1, *supra* note 190, at 93.

289. *Id.* at 102–03.

290. *Id.* at 118. Devereux noted that the bad polygraph result from a test Devereux had arranged also had a negative impact. *Id.* at 97–100, 128.

291. *Id.* at 118, 128–29. At sentencing, Mills' attorney argued that his client should receive a credit for assisting authorities. He noted that Mills met with Kagonyera for an hour and a half and immediately thereafter Kagonyera entered his plea, arguing that Mills "was instrumental" in securing the guilty plea. *Id.* at 118–19.

292. *Id.* at 36.

293. *Id.* at 42.

the video by law enforcement, and when he viewed it, he “said it did not look like Mr. Kagonyera’s car, it was not a Box Chevy.”²⁹⁴

13. Commission Decision

Since the defendants in this case had entered guilty pleas, a decision for the case to move to a three-judge panel for adjudication required a unanimous vote. At the end of the proceeding, the commissioners did vote unanimously that there was sufficient evidence of factual innocence to merit judicial review.²⁹⁵

14. Three-Judge Panel Proceedings and Decision

A contested proceeding, with thirty-three witnesses, was held before a three-judge panel in Buncombe County, beginning September 12, 2011, and concluding on September 21, 2011.²⁹⁶ Unlike the *Taylor* case, the basic evidence and theory supporting innocence was largely unchanged from the Commission hearing to the presentation before the three-judge panel.²⁹⁷ Summey, who had denied to Commission investigators any involvement in the homicide,²⁹⁸ testified before the three-judge panel. He stated that he was not involved in the crime and suggested the bandanas could have been from home break-ins he, Rutherford, and Pickens had done in the Fairview area.²⁹⁹ The assistant district attorney contesting Kagonyera and Wilcoxson’s innocence argued Summey’s explanation of the presence of his DNA on the recovered bandana and that Rutherford could have learned the details of the crime from Kagonyera when they were in the Buncombe County jail at the same time.³⁰⁰ At the conclusion of that hearing, the judges unanimously

294. *Id.* at 28.

295. Kagonyera Hearing Day 2, *supra* note 193, at 265–66.

296. See Three-Judge Panel at 2, *State v. Kagonyera*, 00-CRS-65086 (N.C. Super. Ct. Sept. 22, 2011), <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Opinion%20Kagonyera.pdf> [<https://perma.cc/KZ3N-LX22>].

297. See Clarke Morrison & Jon Ostendorf, *Innocent*, ASHEVILLE CITIZEN-TIMES, Sept. 23, 2011, at A8 (summarizing evidence in the case).

298. See Kagonyera Hearing Day 2, *supra* note 193, at 101–02.

299. See Clarke Morrison, *Defendants testify in innocence case*, ASHEVILLE CITIZEN-TIMES, Sept. 21, 2011, at A3. Summey’s statements to Commission investigators contradicted his alternative explanation. He denied this period of time associating with Pickens and Rutherford, committing robberies, or being in the Fairview area. See Kagonyera Hearing Day 2, *supra* note 193, at 101–04.

300. See Clark Morrison, *Murder Panel Ruling Awaited*, ASHEVILLE CITIZEN-TIMES, Sept. 22, 2011, at A4.

ruled that Kagonyera and Wilcoxson had proven their innocence by clear and convincing evidence, and they were set free.³⁰¹

The exoneration of Isbell, Mills, and Williams took a more circuitous route. From December 16–18, 2013, the Commission held a hearing on the *Isbell*, *Mills*, and *Williams* cases. At the end of the proceedings, the commissioners' vote was not unanimous that there was sufficient evidence to warrant judicial review and the cases before the Commission were closed.³⁰² However, that negative resolution had no adverse impact on their right to file motions for post-conviction relief (“MAR”),³⁰³ which the men did. After the election of a new district attorney, Todd Williams, they were declared innocent in a hearing on those post-conviction motions, where Williams agreed the evidence showed their innocence.³⁰⁴

C. *The Willie Grimes Case*

This case, like the others, has a number of elements found frequently in wrongful conviction cases. Along with the *Kagonyera & Wilcoxson* case, it is one of only two among the seven where mistaken eyewitness identification evidence played a role, and the only case where such evidence was central to the wrongful conviction.³⁰⁵ Although the relationship cannot be proven, it appears that the memory of the witness regarding the features of the man who raped her was transformed by information she learned after the event about a person her neighbor believed to be the rapist. The impact of a financial reward for information helpful in conviction may also have played a distorting role in the wrongful conviction. In this case and the *Sledge* case discussed later, microscopic hair comparison evidence contributed to the wrongful conviction.

301. See Three-Judge Panel, *supra* note 296, at 2.

302. See *State v. Isbell, Mills, Williams*, N.C. INNOCENCE INQUIRY COMM'N, <http://www.innocencecommission-nc.gov/isbell.html> [https://perma.cc/Z8Z6-XD5X].

303. In North Carolina, the state post-conviction relief motion is a MAR. Because this Article is written for both a national and a state audience, post-conviction motions related to specific cases will also include the MAR nomenclature.

304. See Tonya Maxwell, *Judge Finds 3 Men Innocent in 15-Year-Old Murder Case*, CITIZEN-TIMES (Oct. 1, 2015), <http://www.citizen-times.com/story/news/local/2015/09/30/judge-finds-3-men-innocent-15-year-old-murder-case/73090146/> [https://perma.cc/WZ26-WVY4]. These three defendants together with Kagonyera and Wilcoxson also received a total of \$7.9 million in settlements of their civil law suits against Buncombe County officials. See *id.*

305. Eva Kelley's testimony in the Taylor case might be added to this list, but the predominant issue with her testimony was not the question of a mistaken identification, but rather of the problems associated with informants—an incarcerated witness providing a new version of her story long after the event potentially to secure her liberty. See *supra* notes 92–101 and accompanying text.

A key role of the Commission in this case was locating long-lost fingerprints and having those prints compared to a broad database of known prints, while also locating an officer's personal case file. Once the latent prints were positively identified as those of another individual who matched the initial description of the rapist, the role of the Commission investigators was to ascertain whether there was an innocent explanation for the prints being found in the victim's apartment and whether other evidence supported or refuted Grimes' innocence. The thoroughness of the Commission's investigation played an important part in the overall persuasiveness of the case for innocence.

1. The Crime

On the evening of October 24, 1987, Carrie Elliott, a sixty-nine-year-old white woman, was at home in her public housing apartment in Hickory, North Carolina, a midsize town roughly an hour northwest of Charlotte.³⁰⁶ Sometime after 9:00 p.m., she heard a knock on the door while sitting on her couch pasting saving stamps she had received from a supermarket trip onto a card.³⁰⁷ Thinking it was her next door neighbor, she opened the inside door, and a man, who had already opened the storm door, gave the inside door a shove and knocked her across her living room.³⁰⁸ The man told her that he was going to spend the night. Elliott told him to get out and started screaming, but he said no one would hear her because he saw the couple in the apartment on one side leave and the apartment on the other side was empty.

He then pushed her down on the couch and raped her.³⁰⁹ A short time later, he dragged her to her bedroom and raped her again. She got away from him and went into the living room. He followed her, saying he was hungry and asking what she had in her refrigerator. She responded that she didn't have anything and started praying out loud, which caused the intruder to say he "had never heard such screaming,

306. N.C. Innocence Inquiry Comm'n Brief at 3, *State v. Grimes*, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012) [hereinafter *Grimes Comm'n Brief*], <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Grimes%20full%20scanned%20Brief.pdf> [<https://perma.cc/3V8Y-3ZWY>].

307. Appendix J, *Grimes Trial Transcript* at 16, *State v. Grimes*, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012) [hereinafter *Grimes Brief*, app. J], <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Grimes%20full%20scanned%20Brief.pdf> [<https://perma.cc/3V8Y-3ZWY>]. The stamps, called Budget Save-A-Stamps, were obtained from the Fresh Air Market. *Id.*

308. *Id.*

309. *Id.* at 17–18.

let me get out of here.”³¹⁰ On his way out the back door, the intruder took all but one apple and two bananas from a bowl of fruit on the kitchen table.³¹¹ Forgetting the phone number for the police, Elliott phoned a relative who she asked to call the police. Two Hickory police officers arrived a few minutes later.³¹²

2. Hickory Police Investigation

While in her apartment, Elliott gave a description of the perpetrator to Officer Gary Lee. She described him as a black male, approximately six feet tall, weighing 200 to 225 pounds, approximately thirty-five years old, very dark skinned, with bushy hair.³¹³ After going to the hospital, where evidence was gathered for the rape kit and items of clothing were taken into evidence, Elliott went to the Hickory Police Department where she was interviewed by Sergeant J.L. Blackburn. She described the rapist as a black male, approximately thirty-five years old, somewhere between six feet and six feet one inch tall, as having bushy hair, needing a shave, wearing dark pants and green pullover shirt, and having a strong odor of alcohol—smelling of “rock gut liquor.”³¹⁴

Elliott was also shown a photo lineup containing six pictures of African American males. She was not able to make an identification, stating that “none of the pictures in the lineup was the suspect.”³¹⁵ Among these six was the photograph of Albert Lindsey Turner,³¹⁶ who became an alternate suspect decades later during the Commission investigation. Whether anyone in the photos was a suspect is unclear. However, there is some suggestion Turner may have been a suspect since in a photocopy of the array in Detective

310. *Id.* at 22.

311. *Id.* at 21–22. In her testimony, Elliott does not describe the table as her kitchen table, but crime scene photos and other testimony establish that the table with the fruit on it was in the kitchen. See the testimony of Jack Holsclaw, Hickory Police Department’s Evidence Technician testimony about processing an apple and two bananas lying on the kitchen table for fingerprints. *Id.* at 77. See Grimes Comm’n Brief, *supra* note 306, at 3.

312. Grimes Brief, app. J, *supra* note 307, at 22.

313. *Id.* at 56 (testimony of Officer Lee); Appendix A at 4, Hickory Police Dep’t File, Report of Officer Lee, Oct. 24, 1987, State v Grimes, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012) [hereinafter Grimes Brief, app. A], <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Grimes%20full%20scanned%20Brief.pdf> [<https://perma.cc/3V8Y-3ZWY>] (report of Officer Blackburn).

314. Grimes Brief, app. J, *supra* note 307, at 66 (testimony of Blackburn); Grimes Brief, app. A, *supra* note 313, at 11.

315. Grimes Comm’n Brief, *supra* note 306, at 6; Grimes Brief app. A, *supra*, note 313, at 16.

316. Grimes Brief, app. A, *supra* note 313, at 12 (Hickory Police Dep’t File, Report of Blackburn, Oct. 24, 1987).

Steve Hunt's file five of the photos have numbers written on them while Turner's name is written on his photo rather than a number.³¹⁷ At the time of his most recent arrest, March 1985, Turner's height was given as six feet one inch, and his weight was 203 pounds.³¹⁸

During the police investigation, the apartment was processed for evidence. The Hickory Police Department Evidence Technician Jack Holsclaw testified that he could find no prints of value at either the point of entry or exit. However, he recovered two fingerprints of value from one of the bananas on the kitchen table.³¹⁹ Hairs were collected from the sheet and bedspread in the victim's bedroom.³²⁰ Detective Hunt inspected the area outside the apartment and observed two banana peels in a line about ten feet apart and approximately fifty feet away from the apartment.³²¹ Although he later said he called the banana peels to the attention of other officers on the scene, they were not recovered or examined for fingerprints.³²² He also found an apple core a block away on South Center Street.³²³ He took the apple core to the police department, but did not preserve it and instead threw it in the trash.³²⁴

On Monday, October 26, 1987, shortly after noon, Detective Steve Bryant spoke with Elliott at the police department. Elliott told him that she described the attacker to her neighbor, Linda McDowell, who said she knew "the name of the person who could have raped her."³²⁵ McDowell told Elliott she would only give this name to the police.

317. These two copies of the lineup photos were contained in Hunt's file, Appendix D. In his testimony, Hunt stated that Turner's name on the photo could have meant he was the suspect in the array. Innocence Commission Hearing at 101, 136, *State v. Grimes*, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012) [hereinafter *Grimes Hearing Transcript*], <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/NCIIC%20Hearing%20State%20v%20Grimes.pdf> [https://perma.cc/JSK6-NASU].

318. Comm'n Hearing Handout 1, *State v. Grimes*, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012) [hereinafter *Grimes Comm'n Handout 1*], <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Handout%201%20-%20Revised%20Appendix%20C.pdf> [https://perma.cc/46PS-4F37].

319. *Grimes Brief*, app. J, *supra* note 307, at 77–78.

320. *Id.* at 80.

321. *Id.* at 96, 101.

322. *Id.* at 101. Hunt explained that he was not on duty when the crime occurred but heard a radio broadcast about it mentioning the fruit being taken. On his way to the police station, he saw the apple core on Center Street and picked it up. Hunt then went to the crime scene to see what he could find on the exterior of the house. *Id.* at 99–100.

323. *Id.* at 100.

324. *Id.* at 100–01.

325. *Grimes Brief*, app. A, *supra* note 313, at 1 (report of Officer Bryant).

After the conversation with McDowell, Elliott added to her description of the rapist. She told Bryant that he talked with a lisp, perhaps because he was drunk. Elliott also said the perpetrator had a mole or some kind of a bump on the side of his face, perhaps the right side, but she wasn't sure. She thought she might have scratched his face or the mole because she broke her fingernail on him. She also said she thought she could recognize the attacker if she could see him again.³²⁶ Elliott's mention of the mole turned out to be very significant since Grimes had a very prominent mole or growth on the left side of his face.³²⁷

A little after 4:00 p.m. that day, Elliott's neighbor, McDowell, called Bryant and told him she knew a man who fit Elliott's description of the attacker and would come to the police department later to give Bryant the name.³²⁸ Half an hour later, McDowell arrived and told Bryant that Willie Grimes met the description, had a large mole on his face—the left side she thought. She said Grimes had spent a lot of time at Beary Allen's apartment, which was adjacent to Elliott's apartment on the opposite side from McDowell. That apartment was currently empty because Allen had recently moved out. Also, McDowell reported that Grimes was at her sister's house on Saturday night wearing a green pullover shirt.³²⁹

McDowell ultimately received a \$1,000 Crime Stoppers reward for the information she provided the police.³³⁰ Her conversation with Elliott and belief that Grimes fit the description of the rapist was a pivotal event in the investigation. Even without any concern about McDowell's motivation in focusing on Grimes as the rapist, the potential impact of her suggestion of Grimes as the likely perpetrator on Elliott's memory of her attacker is very troubling because of its

326. *Id.* at 1–2.

327. Grimes Brief, app. J, *supra* note 307, at 255. Grimes testified that the growth, which was in fact a birthmark, looked like “a bunch of grapes” on his left jaw. The birthmark was surgically removed because of concern that it might be cancerous. Grimes Hearing Transcript, *supra* note 317, at 406–07.

328. Grimes Brief, app. A, *supra* note 313, at 7 (report of Officer Bryant).

329. *Id.*

330. McDowell confirmed that she received the reward. Grimes Hearing Transcript, *supra* note 317, at 220, 225, 289. Defense attorney de Torres testified that the information about McDowell receiving the Crime Stoppers reward only came out after the trial through a local newspaper story. *Id.* at 167–69. In his testimony before the Commission, Hunt stated that Linda McDowell was a confidential source or informant for Bryant and had worked with him in other cases prior to the Grimes case. *Id.* at 89. McDowell denied that she was an informant. *Id.* at 288–89. Bryant could not specifically recall McDowell being an informant. *Id.* at 630.

potential distorting impact on her memory and the accuracy of her eyewitness identification.³³¹

That evening, Bryant showed Elliott another photo lineup of six photos, which included one of Grimes. After looking at the photos for about fifteen seconds, Elliott pointed to Grimes' picture and said, "this is the man that raped me, this is the man, he raped me and did that awful thing to me."³³² Whether the mole was visible in Grimes' photo could not be determined from the photos themselves because the ones available to the Commission were of such poor quality, but Grimes' defense attorney Ed de Torres testified that the mole was visible and Grimes' picture was the only one of a man with a mole.³³³ At the time of his arrest on October 27, 1987, Grimes was recorded in police records as six feet two inches tall and weighed 165 pounds.³³⁴ Grimes had a growth that was generally described as a mole about half an inch in diameter on his left cheek just above his mouth.³³⁵ In addition, although not described by the victim, he was also missing the tips of his index and middle fingers on his right hand.³³⁶

Attorney de Torres told the Commission investigators that Grimes always maintained his innocence, providing the attorney with information about an alibi.³³⁷ De Torres prepared affidavits for the alibi witnesses, which he provided to the prosecutor in the hope the charges would be dismissed.³³⁸ De Torres also filed a motion to have comparison made between hair recovered from the crime scene and his client's hair since such testing had not been done by the

331. The potential effect of McDowell's information on Elliott's memory is discussed in connection with testimony received from an eyewitness identification expert, Jennifer Dysart, during the three-judge panel hearing. *See infra* notes 396–397 and accompanying text.

332. Grimes Brief, app. A, *supra* note 313 (report of Officer Bryant).

333. Grimes Hearing Transcript, *supra* note 317, at 165. At trial, de Torres challenged admission of the identification, but after a hearing, the judge ruled that the identification was reliable and not impermissibly tainted by suggestive pretrial identification procedures. Therefore, it did not violate due process, and the judge allowed the in-court identification. Grimes Brief, app. J, *supra* note 307, at 24–45. The court excluded the out-of-court photographic identification on the grounds that Elliott could not authenticate the photos as those previously shown to her. *Id.* at 43.

334. Grimes Brief, app. A, *supra* note 313 (booking photo).

335. Grimes Hearing Transcript, *supra* note 317, at 352. The birthmark was removed in 1991 while he was in prison. *Id.*

336. *Id.* at 354.

337. Indeed, de Torres found Grimes' case unique and the one that haunts him the most. This is because he doesn't think Grimes was guilty. *Id.* at 161.

338. Grimes Hearing Transcript, *supra* note 317, at 152–55. *See* Appendix F, Affidavits of Defense Alibi Witnesses, *State v. Grimes*, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012), <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Grimes%20full%20scanned%20Brief.pdf> [<https://perma.cc/3V8Y-3ZWY>].

prosecution.³³⁹ He said Grimes supported the motion, and he voluntarily provided his hair samples.³⁴⁰ However, the microscopic comparison worked out badly for Grimes. On June 28, 1988, the prosecutor notified de Torres that “one of the hairs found at the crime scene matched with those samples from Mr. Grimes.”³⁴¹ This evidence became a major part of the prosecution’s case.

3. The Trial

At trial, Elliott testified to the horror of the rapes, her observation of the man and the mole on his face, and identified Grimes in court as the rapist. The testimony appeared to be very powerful and, despite efforts by Attorney de Torres, not seriously challenged by cross-examination.³⁴² The defense brought out Elliott’s omission of several elements of her current testimony from her statements to the police on the night of the crime.³⁴³ However, the prosecution appeared relatively effective in highlighting Elliott’s shaken emotional condition right after her horrible ordeal and the briefness of the police interviews.³⁴⁴

339. Appendix G, Motion and Correspondence Regarding Scientific Testing, *State v. Grimes*, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012) [hereinafter *Grimes Brief*, app. G], <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Grimes%20full%20scanned%20Brief.pdf> [https://perma.cc/3V8Y-3ZWY].

340. *Grimes Hearing Transcript*, *supra* note 317, at 191 (de Torres stating Grimes was supportive of the motion); *Grimes Brief*, app. J, *supra* note 304, at 102–03 (Hunt acknowledging that Grimes voluntarily provided samples).

341. *Grimes Brief*, app. G, *supra* note 339 (letter from assistant district attorney William L. Johnson, Jr. to de Torres, June 28, 1988).

On June 28, 1988, the SBI completed a report regarding the hair comparisons. It stated that examination of one of the hairs recovered from the crime scene “revealed the presence of a Negroid head hair which was found to be microscopically consistent with the head hair of Willy Grimes. Accordingly, this hair could have originated from Willie Grimes.” *Comm’n Hearing Handout 9, State v. Grimes*, 87-CRS-13541-42 (N.C. Super. Ct. Oct. 5, 2012) [hereinafter *Grimes Comm’n Handout 9*], <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Handout%209%20-%20Hamlin%20Report%20and%20Bench%20Notes.pdf> [https://perma.cc/Q8AD-SHJL].

342. *Grimes Brief*, app. J, *supra* note 307, at 15–24, 46–47.

343. *Id.* at 49.

344. Elliott responded to the cross-examination question regarding the omission of two facts with the partial sentence “If you had been thru what I had . . .” *Id.* at 49–50. When asked on cross-examination by defense attorney de Torres whether Elliott had mentioned seeing the attacker around the apartments, Officer Lee, who took the first description and description of the crime said, “She made no mention of that. She was real distraught at the time.” *Id.* at 57. With regard to the description of events, Lee said the description was brief so he could get it out over the police radio. *Id.* at 56. The other officer initially with Elliott on the crime scene was Officer Susan Moore, who described her as “very distraught and . . . emotionally upset” when she saw Elliott in her apartment shortly after the crime. *Id.* at 59. When Sergeant Blackburn saw her at the police station at 11:45 p.m., she was “very distraught and emotional.” *Id.* at 64–65.

At trial, Jack Holsclaw, Hickory Police Department Evidence Technician, testified that he compared the fingerprints recovered from the bananas to Willie Grimes, and they did not match. He did not compare the fingerprints to the victim's or those of anyone else.³⁴⁵

Troy Hamlin, a special agent at the SBI who specialized in hair examination, testified that he examined the eight hairs recovered from Elliott's bed, one of which was of sufficient length for comparison purposes. He compared it to Grimes' head hair, and it was "found to be microscopically consistent and accordingly this hair could have originated from Mr. Grimes."³⁴⁶

The defense presented an alibi supported by the testimony of eight witnesses. Grimes also testified denying the rape and describing his actions on the day of the crime.³⁴⁷

Two different prosecutors gave the closing argument and both addressed the hair comparison evidence. Without objection, the first stated that the jury had heard the SBI agent testify that "no two individuals have the same type of hair,"³⁴⁸ and argued that "the only place that hair [sic] could have possibly come from is the defendant, from his head and it came from him when he was assaulting this lady."³⁴⁹ The other prosecutor was somewhat more cautious, stating that the hair report indicated it was "remotely possible that somewhere [in] this world somebody else may exist with the same type of hair."³⁵⁰ The prosecutor claimed no glaring contradictions in

345. Grimes Hearing Transcript, *supra* note 317, at 25.

346. Grimes Brief, app. J, *supra* note 307, at 122. During attorney de Torres' cross-examination, he asked Hamlin whether DNA testing had been done on the hair, and he said he believed that DNA testing had not been attempted with the hair. *Id.* at 131. This exchange prompted a juror to ask for an explanation of DNA because he did not "understand what that refers to." *Id.* at 133.

347. *Id.* at 235–45 (recounting events of the day); *id.* at 246 (stating that he did not wear his green pullover sweater until October 26, 1987, when he went back to work); *id.* at 248–49 (wearing that green pullover sweater when he turned himself in on Tuesday, October 27, 1987).

348. To the contrary, at least in terms of microscopic examination, human hairs are not unique and not uniquely identifiable. The handout provided to the Commissioners provided the description of a "positive association" regarding microscopic hair comparison to mean that the recovered hair "exhibits the same microscopic characteristics . . . and . . . could have come from the same source It should be noted that the microscopic comparison of hairs is not a method of positive identification." Hair Analyst Presentation, *State v. Grimes*, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012), <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/PP%20used%20during%20Houck's%20Testimony.pdf> [https://perma.cc/5CDL-FL2H]. Dr. Max Houck, an expert in microscopic hair comparison testified that any hair comparison report should explicitly note that it is "not a method of positive identification." Grimes Hearing Transcript, *supra* note 317, at 514.

349. Grimes Brief, app. J, *supra* note 307, at 8 (closing argument).

350. *Id.* at 23.

the alibi testimony, arguing instead that uncertainty regarding the timing of events in the alibi left room for Grimes to have committed the rape.³⁵¹ As to the unidentified fingerprint, the prosecutor suggested that it could have been left by the people who “worked in the grocery store where [the victim] bought those pieces of fruit.”³⁵²

Grimes was convicted of two counts of first-degree rape and one count of second-degree kidnapping and sentenced to life imprisonment on the rape convictions, plus nine years for kidnapping.³⁵³

At sentencing, defense attorney de Torres asked for access to the physical evidence and for funding to test it for a motion for post-conviction relief. He also asked that the recovered fingerprints be sent for comparison to others in the FBI database.³⁵⁴ The court did not rule on the motion and instead took it under advisement,³⁵⁵ but the motion was never revisited.³⁵⁶

4. Commission Investigation and Proceedings

The Commission hearing was held April 2–4, 2012. At the outset of the hearing, Commission Executive Director Kendra Montgomery-Blinn explained that after the Commission received a federal grant for DNA testing, she audited cases and reopened a number where further searches for evidence might have a significant impact. The Commission was already aware of the innocence claims and facts of the Grimes case because the Commission used its fact pattern in 2007 to test Commission rules and procedures for training. The case was also the subject of a *Denver Post* article about the pre-DNA hair comparison evidence that convicted Grimes and the subsequent loss and destruction of evidence that prevented an effective challenge to that evidence.³⁵⁷ When the audit was conducted and this case came to mind, Grimes was sent a questionnaire and consent form, which he returned in October 2010.

351. *Id.* at 15–19.

352. *Id.* at 22–23.

353. Grimes Brief, app. J, *supra* note 307, at 3–4 (sentencing transcript).

354. *Id.* at 5–6.

355. *Id.* at 7.

356. *Id.* at 11 (noting there was no follow-up by defense counsel noted in the file and no subsequent ruling).

357. Susan Greene, *Apple Tossed in Garbage May Have Cleared Man*, DENVER POST (July 25, 2007), <http://www.denverpost.com/2007/07/24/apple-tossed-in-garbage-may-have-cleared-man/> [<https://perma.cc/PTA5-7WBS>] (comprising part of *Denver Post*'s “Trashing the Truth” series about failures of evidence preservation).

Despite multiple unsuccessful inquiries over a number of years regarding the physical evidence,³⁵⁸ the Commission's inquiry produced a prompt positive response from the Hickory Police Department that it had in its files two latent fingerprint lifts collected from the crime scene.³⁵⁹ The process quickly moved from that discovery to the entry of the prints into the state's Automated Fingerprint Identification System ("AFIS") and then, in December 2011, to a positive identification by the SBI Crime Lab of both prints as those of Albert Turner.³⁶⁰ The case was immediately moved into the formal inquiry stage.³⁶¹ In the end, the fingerprint identification formed the centerpiece of the innocence case before the Commission. Thereafter, the very thorough investigative work by the Commission was focused on determining the significance of the fingerprint match, whether other testable evidence and files might also exist, and investigation of the case to determine the strength of the other evidence that might support guilt or innocence.

The Commission was successful in obtaining a copy of the Grimes investigative file from the Hickory Police Department. In addition, Steve Hunt, one of the original investigators assigned to the case, retained his own case file, which included some documents that were not in the department file.³⁶² The Commission staff attempted to locate all of the physical evidence, including the rape kit, clothing, bedding, and the compared hair for DNA testing. Despite their detailed inquiry and participation in searches with multiple agencies and in several locations, none of the physical evidence could be

358. Grimes Comm'n Brief, *supra* note 306, at 4, 14–15 (describing Grimes' application to multiple agencies and attorneys seeking post-conviction assistance and the unsuccessful efforts of several, including a multi-year effort by the North Carolina Center on Actual Innocence, to locate any of the physical or other evidence in the case).

359. Jamie Lau testified that his efforts to find evidence from the Catawba County Clerk's office and the Sheriff's Office, which handles evidence destruction, produced negative results. *Id.* at 13. He then contacted the Hickory Police Department and received an e-mail that a latent lift card had been located. *Id.* at 14.

360. The two fingerprints were entered into the state's AFIS with the cooperation of the Catawba County District Attorney's Office. The AFIS search returned a hit on one of the prints for Albert Turner. *Id.* at 4. SBI direct comparison then confirmed that both prints matched two different fingers, Turner's left index and middle finger. Grimes Hearing Transcript, *supra* note 317, at 43–44 (testimony of Brian Delmas, SBI fingerprint examiner).

361. Grimes Hearing Transcript, *supra* note 317, at 8–9.

362. Grimes Comm'n Brief, *supra* note 306, at 9–10. The Hickory Police Department file is Appendix C to the Commission Brief and Appendix D contains the documents from Hunt's file with any duplicate documents also contained in the department file removed. Both are referenced within the brief. *Id.*

located.³⁶³ As a result, DNA testing, specifically mitochondrial DNA testing, on the hairs recovered from the crime scene, could not be done. Because the victim had passed away before Commission considered the case, her insight was unavailable.³⁶⁴

Troy Hamlin, who conducted the hair comparison for the SBI in 1988, testified before the Commission. He characterized hair comparison evidence as still valuable today, but it explained that it cannot by itself prove identity. Instead it is a “collaborative” tool along with other evidence³⁶⁵ or a screening technique.³⁶⁶ In general, he stood behind the testimony he gave in the *Grimes* case, but he said that today he would submit the hair for DNA analysis,³⁶⁷ which is a superior technology.³⁶⁸ He did acknowledge that in 1988, unlike in later years, the SBI did not require a peer review of a positive comparison, which would entail another analyst looking at the slides of hair judged to be consistent and determining whether that analyst agreed or disagreed with the initial assessment.³⁶⁹ He was asked about the statements and characterizations made by the prosecution of his testimony and the significance of the comparison evidence. He said he had not been consulted by the prosecution about making these statements, and he found each of them generally inaccurate in overstating significance.³⁷⁰

The Commission investigators attempted to contact all eight alibi witnesses. Four had passed away.³⁷¹ Betty Shuford, one of the four remaining alibi witnesses testified before the Commission. The other three were interviewed by the investigators, who testified about these interviews in which all four continued to insist that Grimes was with them on the night of the crime.³⁷²

363. Grimes Hearing Transcript, *supra* note 317, at 10–24 (describing numerous unsuccessful inquiries and searches for the physical evidence).

364. *Id.* at 632.

365. *Id.* at 439–40.

366. *Id.* at 447.

367. *Id.* at 472–73.

368. *Id.* at 447. Both Hamlin and another hair comparison expert, Max Houck, testified about an FBI study that did mitochondrial DNA examination of hairs found to be microscopically consistent. The study found that in 11% (nine of eighty) of the cases the DNA did not match despite the hairs having been found to be microscopically consistent. *Id.* at 491–92 (testimony of Hamlin); *id.* at 520–21 (testimony of Houck).

369. *Id.* at 447–48.

370. *Id.* at 484–86.

371. *Id.* at 332–35 (Brenda Smith, Rachel Wilson, Carolyn Shuford, Lucille Shuford).

372. *Id.* at 297–30 (Betty Shuford); *id.* at 332–36 (Barbara Wilson, Lib King, Richard Wilson).

The Commission investigators detailed Grimes' consistent assertions of his innocence throughout the years in correspondence, jail records, parole board communications, and their interviews with him.³⁷³ Grimes testified before the Commission, maintaining his innocence and detailing his activities on the day of the crime.³⁷⁴ With regard to contact with the victim, he testified to an incident about a month before the crime when Beary Allen, the victim's next-door neighbor, asked Albert Turner to leave his residence, but Turner refused. Allen then asked Grimes to go next door to Elliott's apartment to have the police called. When Grimes went next door, Elliott came to the door but would not open it, but she called the police for Grimes.³⁷⁵ Commission investigators detailed Grimes' criminal record, which involved several minor crimes.³⁷⁶

Obviously, a key figure in the Commission's investigation was Albert Turner, the individual identified through the 2010 fingerprint submission. In terms of height he, like Grimes, fit Elliott's description of her attacker. As to weight, Turner's weight was much closer to the description than Grimes'.³⁷⁷ A key difference supporting Grimes' identification was the mole or growth, which Grimes had, but Turner did not. This evidence was undercut by the fact that this feature was not mentioned in the initial descriptions to the police and was reported only after the victim's conversations with McDowell, her next door neighbor. However, McDowell testified before the Commission and maintained that the victim had been the one to mention that the rapist had a mole, rather than her being the source of that information.³⁷⁸ Cutting against the accuracy of the victim's description as fitting Grimes was also her failure to note that the perpetrator had missing fingertips.

The Commission staff interviewed Turner in recorded interviews on two occasions. During these conversations with investigators,

373. *Id.* at 341–45.

374. *Id.* at 356–80.

375. *Id.* at 389–91. By the time the police arrived, Turner had departed. *Id.* at 391. Turner confirmed that Grimes had gone to Elliott's apartment to make this call but stated that he saw Grimes go inside. Interview by Jamie T. Lau with Albert Turner in Catawba County, N.C., at 81–82 (Feb. 24, 2012).

376. He had been convicted of two DWIs, and having a blue light in his car, charged with trespassing, which was dismissed, and convicted of larceny while in the military. Grimes Hearing Transcript, *supra* note 317, at 395.

377. As described earlier based on arrest records, Turner was six feet one inch, and his weight was 203 pounds, *see supra* note 318 and accompanying text, while Grimes was six feet two inches tall and weighed 165 pounds, *see supra* note 334 and accompanying text.

378. Grimes Hearing Transcript, *supra* note 317, at 223–24. McDowell put her confidence at two on a ten-point scale with one being 100% confident. *Id.*

Turner always denied raping Elliott.³⁷⁹ A major topic of conversation was whether he had been inside the victim's apartment and, if so, under what circumstances. Turner said that he stayed at Beary Allen's apartment, next door to Elliott's apartment, from time to time.³⁸⁰ He said he had a relationship with Peggy Shuping, a prostitute, and that he accompanied Shuping to Elliott's apartment to use the telephone on a number of occasions.³⁸¹ After being confronted with information that his fingerprints were found on a banana in Elliott's apartment, Turner claimed that Shuping had brought fruit to the victim, including bananas³⁸² and Turner had put it in a bowl in the living room,³⁸³ but he insisted he had never been in the kitchen.³⁸⁴

379. *Id.* at 602–03.

380. *Id.* at 569–70. Turner told the Commission investigators that he was staying with Beary Allen and knew Grimes because Grimes had been at Allen's house. Interview by Jamie T. Lau with Albert Turner in Catawba County, N.C., at 24, 43 (Jan. 4, 2012).

Commission investigators spoke with a cab driver, James Hedrick, who reported that he had driven Turner and his friend Peggy Shuping back and forth to Beary Allen's apartment. Grimes Hearing Transcript, *supra* note 317, at 584–85. The initial reason for talking with Hedrick was that criminal records showed Turner had assaulted his mother when she refused to give him money. *Id.* at 584.

381. *Id.* at 570. When first asked whether he had any interaction with Elliott, Turner answered “no.” Interview by Jamie T. Lau with Albert Turner in Catawba County, N.C., *supra* note 380, at 14. Turner subsequently talked of going there with Shuping to use the phone. *Id.* at 22. Turner reported various different times he had been in the victim's apartment, with the numbers generally increasing as the interviews progressed. *Id.* at 22–23, 34–36 (stating two or three times); Interview by Jamie T. Lau with Albert Turner in Catawba County, N.C., *supra* note 380, at 35–36 (stating ten times); *id.* at 11–12, 104 (stating many times). Turner noted that Shuping was white. *Id.* at 109.

382. Grimes Hearing Transcript, *supra* note 317, at 604–05. In the January 4, 2012, interview, investigators first mention “some physical evidence that matches you,” but did not specify what evidence. Interview by Jamie T. Lau with Albert Turner in Catawba County, N.C. (Jan. 4, 2012) at 33. Prior to receiving that information, Turner had stated he had been in the apartment to use the phone, but had not yet mentioned bringing any fruit to Elliott.

Bananas and apples were first mentioned by a Commission investigator in the January 4, 2012, interview. *Id.* at 49. Turner responded by denying eating the victim's fruit and stated that he didn't think he had touched fruit at the victim's house. *Id.* at 49–50. When asked why his fingerprints would be at the scene of the crime, he responded, “I might have gave her a banana or apple,” *id.* at 50, “I might gave [sic] her fruit.” *Id.* at 51. When asked whether he remembers doing that, he responded, “I don't remember. I might have gave some. I may give her something just like I do people here . . . I always give her stuff . . . Peggy Sue always give her something. Yeah, Peggy always gave her something when she'd use the telephone, yeah . . . I probably put them in the baskets and stuff.” Asked whether Elliott had a fruit basket, he responded: “Uh-huh (yes).” *Id.* at 51. Thereafter, his consistent explanation throughout the interviews for the presence of his fingerprints was being in the apartment with Peggy Sue and putting fruit in a bowl there. *Id.* at 129.

At other points, he asserted that numerous people in the community would use Elliott's telephone. *Id.* at 81. “We'd be in Barry Allen's house, and we'd go use the

While Linda McDowell asserted the information about the mole on the attacker's face came from Elliott, she strongly resisted any suggestion that Elliott allowed others from the neighborhood besides McDowell into her apartment. She said Elliott particularly would not let males—even Willie Mason who lived with McDowell—into her apartment. Elliott was very reticent to have a male other than one of her relatives in her apartment since her husband had passed away, which McDowell said was particularly true for African American males.³⁸⁵ Similarly, Elliott's family told Commission Investigator Stellato that the victim would let McDowell into her apartment but no one other than her.³⁸⁶

Stellato assembled Turner's lengthy criminal record and interviewed three of his victims from those crimes. In addition to a long list of other convictions for assault, trespassing and numerous dismissed charges, Turner was convicted eight times for assault on a female (committed against six different women) and two times for assault with a deadly weapon.³⁸⁷

Turner told the investigators that he had a long relationship with one woman³⁸⁸ who was the victim in three of his assault on a female convictions. In Stellato's interview with her, she confirmed they had dated for six to seven years. She said Turner drank a lot and was physically abusive to her multiple times while drinking, including stabbing her with a knife. She also said that while using alcohol he forced her to have sex with him three or four times. In addition, court

telephone, go and call a cab." *Id.* He claimed that Grimes had been in the house to use the phone. *Id.* at 80–81.

Turner stated the last time he was at Elliott's apartment was Sunday, six days before the crime. *Id.* at 111. This time period would have had a noticeable impact on the appearance of the bananas.

383. Grimes Hearing Transcript, *supra* note 317, at 593–94. Interview by Jamie T. Lau with Albert Turner in Catawba County, N.C. (Feb. 24, 2012) at 103, 147–50. He described the bowl as being green and white, *id.* at 149, which is not the color of the bowl on the kitchen table in the crime scene photos—a white bowl. Grimes Comm'n Brief, *supra* note 306, Appendix A (crime scene photos of kitchen).

384. Grimes Hearing Transcript, *supra* note 317, at 11–12, 78, 102–03; Interview by Jamie T. Lau with Albert Turner in Catawba County, N.C. (Feb. 24, 2012).

385. Grimes Hearing Transcript, *supra* note 317, at 237–39, 257. In interviews with the commission investigator, McDowell said Mason might have gone over to the apartment with her a couple times, but Elliott was not comfortable even with him coming over. *Id.* at 590.

386. *Id.* at 589.

387. Comm'n Hearing Handouts, State v. Grimes, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012) <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Handout%2011%20-%20Turner%20Criminal%20History.pdf> [<https://perma.cc/R9PN-W86P>] (# 11, Criminal History—Albert Lindsey Turner).

388. Grimes Hearing Transcript, *supra* note 317, at 570.

records showed that in another of the convictions, he hit her over the head with a liquor bottle.³⁸⁹

Another victim told Stellato that Turner raped her when she was a nine-year-old child. In 2008, she had him arrested for assaulting her when “he jumped on her” without a reason and threatened to have sex with her again.³⁹⁰ In his recorded conversations with Stellato, Turner confirmed he had sex with this woman when she was a child.³⁹¹ Turner’s criminal record suggested he was a man with the potential for violence and sexual aggression against women.

Turner’s violent tendencies reveal the cost that society was forced to bear because the wrong person was convicted. The fingerprint evidence remained the dispositive evidence, and nothing in the case otherwise acted as a counterweight either as to Grimes’ possible guilt or Turner’s innocence. The pictures taken of the crime scene show what appear to be unblemished bright yellow bananas on the kitchen table.³⁹² Elliott was putting grocery store discount stamps onto a card at the time the intruder entered, which suggested, along with the appearance of the bananas, their recent purchase at a grocery store. Indeed, the prosecutor suggested in closing argument that an innocent explanation for the unknown fingerprints was that they were placed there by a grocery store worker where she bought them.³⁹³ However, Turner told Commission investigators that he never worked at a grocery store.³⁹⁴ While Turner’s fingerprints could have been left on the bananas when he and Shuping carried them to Elliott’s apartment, the explanation is quite unlikely for multiple reasons, most notably her reticence to allow unrelated males into her home. The fingerprint evidence retained powerful incriminating evidence against Turner and showed Grimes had been wrongfully convicted.

389. *Id.* at 576–77. These assault convictions occurred between 1999 and 2008. Hearing Handouts, *State v. Grimes*, 87-CRS-13541, 87-CRS-13542 (N.C. Super. Ct. Oct. 5, 2012) <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Handout%2011%20-%20Turner%20Criminal%20History.pdf> [https://perma.cc/R9PN-W86P] (# 11, Criminal History—Albert Lindsey Turner).

390. *Id.* at 579–82. No charges were brought concerning the sexual assault while she was a child. Turner was convicted of assault on a female in the 2008 incident. *Id.*

391. Grimes Hearing Transcript, *supra* note 317, at 599. Interview by Jamie T. Lau with Albert Turner in Catawba County, N.C. at 74, 77–78, 104, 116–20, 123–26 (Feb. 24, 2012).

392. Grimes Brief, app. A, *supra* note 313 (crime scene photos of kitchen table).

393. Grimes Brief, app. J, *supra* note 307, at 22–23.

394. Interview by Jamie. T. Lau, Staff Attorney, N.C. Innocence Inquiry Comm’n, with Albert Turner, in Lenoir, N.C. (Jan. 4, 2012).

5. Commission Decision

The commissioners voted unanimously that there was sufficient evidence of factual innocence to merit judicial review.³⁹⁵

6. Three-Judge Panel Proceedings and Decision

The three-judge panel received evidence for four days from fifteen witnesses in addition to the evidence from the Commission hearing. The testimony of one of those witnesses, Jennifer Dysart, a professor of psychology at John Jay College of Criminal Justice and an expert in eyewitness identification, is notable. Dysart provided an explanation for how Elliott might have moved from an initial description that made no mention of the perpetrator having a mole on his face to a definite memory of that feature and a firm identification of Willie Grimes. This explanation rested on two key prongs. First, the fact that Elliott received information from her neighbor, McDowell, about Grimes after the attack. Second, evidence from psychological studies showing that, after speaking with co-witnesses, witnesses tend to incorporate what their co-witness tells them into their memory and come to believe that they witnessed things that they never actually saw firsthand.³⁹⁶ Dysart also discussed the potential impact of post-identification positive feedback on Elliott's memory regarding the certainty of her identification when she learned of Grimes' arrest based on her identification.³⁹⁷

On October 5, 2012, the fifth day of the hearing, District Attorney James C. Gaither told the panel that he “could not with good conscience” argue against a finding of innocence, noting that he had identified thirty-five “points . . . that either showed unfairness in the prosecution or in the trial that point toward innocence,” and on

395. Grimes Hearing Transcript, *supra* note 317, at 640.

396. Transcript of Three-Judge Hearing at 399–404, *State v. Grimes*, 87-CRS-13541 (N.C. Super. Ct. Oct. 5, 2012) [hereinafter *Grimes Three-Judge Hearing*] (on file with the *North Carolina Law Review*). Dysart relied in particular on the work of Lorraine Hope. *Id.* at 402. See Lorraine Hope et al., “With a Little Help from My Friends . . .”: *The Role of Co-witness Relationship in Susceptibility to Misinformation*, 127 ACTA PSYCHOLOGICA 476, 481–83 (2008) (showing that the effect is particularly strong when the witness and co-witness have a friendship relationship and recounting other related research that shows particularly strong impact of co-witnesses with apparent credibility).

397. *Grimes Three-Judge Hearing*, *supra* note 396, at 430–36. Cf. Robert P. Mosteller, *Pernicious Inferences: Double Counting and Perception and Evaluation Biases in Criminal Cases*, 58 HOW. L.J. 365, 378–79 (2015) (describing a substantial body of psychological research that shows confirming feedback to an eyewitness who has made an identification alters the witness' memory of the identification and its conditions by strengthening the witness' certainty in making the identification and the quality of circumstances of the identification, such as improving the image seen and the speed of the identification).

behalf of the district attorney's office and the State of North Carolina apologized to Willie Grimes.³⁹⁸ The panel ruled unanimously that Grimes was innocent and ordered the charges dismissed.³⁹⁹

D. The Willie Womble Case

Willie Womble's case is the least complex of the seven innocence cases resolved through the Commission process. The Commission proceedings did not rest on a forensic evidence discovery or breakthrough. This case demonstrates the need for an entity whose purpose is dual: finding innocence combined with a practice and perception of Commission neutrality during its search for possible innocence. Willie Womble was a passive, mentally challenged man without an advocate. The Commission, in its inquisitorial role of neutral fact gatherer, developed the full record, which showed clearly that there was no evidence of Womble's guilt. The exoneration is a tribute to the thoroughness and fairness of the Commission's evaluation. The Womble case is the second of the four cases among the seven Commission exonerations that demonstrates innocent suspects do make false confessions.⁴⁰⁰

1. The Crime

Shortly before 9:30 p.m. on November 18, 1975, Roy Brent Bullock was shot during a robbery of the Food Mart where he worked in Butner, North Carolina, a small town about fifteen miles northeast of Durham.⁴⁰¹ When the police arrived, he was still conscious and able to state that two black males whom he did not know had robbed him.⁴⁰² Lois Bullock, the victim's thirteen-year-old daughter, witnessed the crime from a walk-in cooler, which was out of the robbers' sight.⁴⁰³ She described the robbers as two black males, one, six feet to six feet two inches tall, and the other, five feet six inches

398. Grimes Three-Judge Hearing, *supra* note 396, at 694.

399. State v. Grimes, 87-CRS-13540 (N.C. Innocence Inquiry Comm'n Apr. 4, 2012), <http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/Grimes,%20Willie%20-%20Decision%20of%20the%20Three-Judge%20Panel%20Pursuant.pdf> [<https://perma.cc/QER5-T6TL>].

400. False confessions are also found in the *Taylor* case, *supra* Section II.A., the *Brown & McCollum* case, *infra* Section II.E., and the *McInnis* case, *infra* Section II.G.

401. N.C. Innocence Inquiry Comm'n Brief at 3, State v. Womble, 75-CRS-6128 (N.C. Super. Ct. June 3, 2014) [hereinafter *Womble* Brief], <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/Womble%20Brief.pdf> [<https://perma.cc/5SZM-9VW9>]. The crime was reported to the Butner Police Department at 9:30 p.m. *Id.* at 21 (Momier's SBI report).

402. *Id.* at 22 (Momier's SBI report).

403. *Id.* at 3.

tall.⁴⁰⁴ She did not see the faces of either man because the tall robber had a bandana around his face and she could only see the top of the short robber's head.⁴⁰⁵ The victim died during surgery shortly after midnight.⁴⁰⁶

2. The Initial Law Enforcement Investigation

The Commission obtained the SBI file of Special Agent Joseph Momier, Jr. who investigated the Bullock homicide. This file, which was not available to the defense, described the progress of the investigation. On November 19, 1975, Momier and Butner Police Officer Nelson T. Williams traveled to nearby Durham and interviewed several Durham police detectives, who provided the names of five possible suspects, four of whom were listed because of prior criminal activity.⁴⁰⁷ As to two of the four, Momier's report states that he "was advised by Detective Lorenzo Leathers and Detective Lieutenant Richard G. Morris . . . that suspects PERRY and WILLIS had been reported to be pulling most of the armed robberies in the Durham area."⁴⁰⁸ The information provided by the Durham detectives regarding Womble did not describe prior criminal activity, but instead stated that "WOMBLE was reported to be traveling around with PERRY and WILLIS."⁴⁰⁹

On December 7, 1975, Detective Leathers interviewed Womble at the Durham County Jail where he was confined on an unrelated charge.⁴¹⁰ In this interview, Leathers obtained a written statement in which Womble confessed to being a lookout in the crime. The statement was in Leathers' handwriting,⁴¹¹ but signed by Womble.⁴¹² The statement recounted that Womble went with Joe Perry, Albert Willis, and Boo Boo, who was identified as James Cardell Frazier,⁴¹³

404. *Id.* at 22 (Momier's SBI report).

405. *Id.* at 81 (citing Transcript of Record at 5–6, *State v. Womble*, 75-CRS-6128 (N.C. Super. Ct. 1976)); *id.* at 172 (citing Transcript of Record at 4, *State v. Perry*, 75-CRS-6042 (N.C. Super. Ct. 1975)).

406. *Id.* at 23 (Momier's SBI report). The medical examiner's report gave the time of death as 12:20 a.m. on November 19, 1975. *Id.* at 79.

407. The first two, who were brothers, were described as having committed or being suspected of committing armed robberies with similar modus operandi. *Id.* at 25 (Momier's SBI report). These suspects played no role in the investigation or case.

408. *Id.* at 25 (Momier's SBI report).

409. *Id.* at 25 (Momier's SBI report).

410. *Id.* at 46–47 (Momier's SBI report).

411. *Id.* at 92 (transcript of Leather's trial testimony).

412. *Id.*

413. Frazier was interviewed on December 10, 1975. He stated that his 1965 white Ford had been broken down since the first week in November. He denied any involvement in the crime. *Id.* at 49 (Momier's SBI report).

in Frazier's white 1964 or 1965 Ford to Butner. Womble was offered \$20 to be a lookout for them. All three of the others were armed, Perry with a .22 automatic pistol. On the way back to Durham, Perry counted the money, which totaled \$210,⁴¹⁴ and gave \$20 to Womble for his lookout role.⁴¹⁵ Two days later, Womble signed a typed version of that statement.⁴¹⁶

At a subsequent interview conducted by Momier and another SBI agent on December 12, 1975, Womble recanted his involvement in the robbery.⁴¹⁷ He said he had not been in Butner on the night of the robbery and did not take part in it. Rather, a friend, Mike Watkins, acted as lookout and told Womble the information in the statement. Womble said he gave the original statement because Leathers promised to help with a pending Durham case "if he lied about this case and testified in court."⁴¹⁸

Two days later, Momier was present along with Leathers when Assistant District Attorney David Waters offered Womble "absolute immunity from prosecution" for truthful testimony regarding the Bullock murder.⁴¹⁹ According to Momier's report, Womble said that his previous statements were not true and that Leathers had not tried to get him to lie. In this version, Womble said he rode to Butner with another individual, Robert Williams, with whom he played pool. Perry, Willis, and Frazier came in the poolroom but left a few minutes later. He decided to catch a ride with them back to Durham. As he walked in front of the Food Mart, he saw the three commit the armed robbery and Perry shoot the manager. The three men ran out, and he got into Perry and Willis' black Cadillac, which was parked nearby, and rode back to Durham with them.⁴²⁰

414. However, \$387.60 was missing from the cash register according to testimony by the owner of the Food Mart, who was able to corroborate the missing amount by checking the receipts. *Id.* at 173.

415. *Id.* at 95–97 (Leather's trial testimony reading statement by Womble).

416. *Id.* at 47 (Momier's SBI report). Momier was present and Womble's lawyer was present when Momier read the statement, but not when Womble signed it. *Id.* at 98–99. On December 10, 1975, Womble was interviewed by Momier in the Granville County jail with his lawyer present. In this interview, according to Momier's report, Womble continued to say the men traveled in Frazier's white Ford, that Perry shot the man, and that Womble received \$20 for his role as lookout. *Id.* at 48 (Momier's SBI report).

417. *Id.* at 50–51 (Momier's SBI report).

418. *Id.* at 51 (Momier's SBI report). In an interview the next day with Momier and Officer Williams at the Granville County Jail, Womble repeated that he did not go to Butner but got the information from his friend Watkins. *Id.* at 52–53 (Momier's SBI report).

419. *Id.* at 54 (Momier's SBI report).

420. *Id.* (Momier's SBI report). Womble's lawyer was not present at this meeting. Three-Judge Hearing Transcript at 8, *State v. Womble*, 75-CRS-6128 (N.C. Super. Ct. Oct.

A preliminary hearing was held on December 17, 1975, for the four defendants charged in the murder—Frazier, Perry, Willis, and Womble. Womble testified that he did not go to Butner on the day of the robbery-murder. The preliminary hearing was halted at that point.⁴²¹ The charges against Frazier and Willis were dismissed when the hearing resumed on December 31.⁴²² On January 7, 1976, at a preliminary hearing for Perry and Womble, probable cause was found.⁴²³

3. The Willie Womble Trial

Womble and Perry were tried separately. Womble was tried first, his trial being held July 6–7, 1976. The victim’s daughter testified that she could not identify the men and could not say if Womble was one of them.⁴²⁴ The evidence against Womble was provided solely by Leathers, who testified that Womble confessed to being a lookout in the Butner robbery. Womble’s confession in Leathers’ handwriting and the typed version, both signed by him, were also introduced as evidence.⁴²⁵

Leathers testified that he read the statements to Womble. He also said that Womble could read and that Womble read them over himself.⁴²⁶ Contrary to the information in the SBI report that Leathers knew about the Butner murder and identified Womble as a potential suspect,⁴²⁷ Leathers claimed that he “had no idea about this incident”

17, 2014) [hereinafter Womble Three-Judge Hearing], <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/Womble%20Three-Judge%20Panel.pdf> [<https://perma.cc/W7YL-ZLWL>].

421. Womble Brief, *supra* note 401, at 57 (Momier’s SBI report). Agent Momier reported that on the day of the preliminary hearing he was informed by the court appointed counsel for Willis that he had interviewed Womble by mistake when he began talking to him without asking his name. At that interview Womble told the attorney that he did not intend to testify against Willis, Perry, or Frazier. Apparently, the prosecutor nevertheless put Womble on the stand. In his report, Momier describes an effort by Womble to converse with the judge regarding a paper that Womble said Momier had given him promising him 121 years in prison for the armed robberies. Womble made this effort after denying that he went to Butner at the time of the crime. *Id.*

422. *Id.* at 58 (Momier’s SBI report).

423. *Id.*

424. *Id.* at 82.

425. *Id.* at 88–98 (transcript of Leathers’ trial testimony).

426. *Id.* at 97–99 (transcript of Leathers’ trial testimony).

427. *See supra* text accompanying notes 407–416. This information was apparently not disclosed to Womble’s attorney. Womble’s attorney had virtually no memory of the case. *See* Transcript of Record Day One at 157–61, *State v. Womble*, 75-CRS-06128 (N.C. Innocence Inquiry Comm’n June 3, 2014) [hereinafter Womble Hearing Day 1], <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/NCIIC%20Hearing%20Transcript%20-%20State%20v.%20Womble.pdf> [<https://perma.cc/TD22-EUWB>] (testimony by Stellato regarding conversations with attorney William Parks); Affidavit of William Parks

in Butner. Rather, Leathers said he was there to question Womble about “incidents that had taken place in Durham.”⁴²⁸ Leathers did not mention Womble’s subsequent recantation of his role in the crime, even though this recantation was made to the prosecutor in Leathers’ presence.⁴²⁹

Womble took the stand in his own defense. He testified that he had finished only the fourth grade and had both a reading and a writing problem.⁴³⁰ Throughout his testimony, he contended that the handwritten statement had already been prepared when Leathers arrived to interview him.⁴³¹ He denied telling Leathers any of the information in the statement and asserted that he didn’t know what he was signing.⁴³² Womble testified that Leathers had said he wanted to “hang Joe Perry.”⁴³³ When Leathers read the statement to him and Womble told him that he didn’t “know nothing about it,” Leathers responded that he would “hang” Womble too.⁴³⁴ Womble explained during cross-examination that the reason he signed the statement was that the officers were “pressuring [him], getting all up in [his] face [and] breathing down [his] neck like they wanted to jump on him.”⁴³⁵

As developed in cross-examination, the prosecution’s theory regarding Womble’s initial admission of guilt and subsequent denial was that Womble told Leathers what he knew about the Butner

at 1–2, *State v. Womble*, 75-CRS-06128 (N.C. Super. Ct. June 1, 2014), <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/Handouts%20Given%20to%20Commissioners%20During%20The%20Hearing.pdf> [<https://perma.cc/L37M-5TGC>] (acknowledging that he had initially misremembered that Perry and Womble were tried together and continuing to assert that he had worked closely with Perry’s more experienced lawyer despite obvious conflicts; affidavit among other handouts submitted to the Commission). The assumption that it was not disclosed is based largely on the failure of the defense attorney to make reference to this or any other materials from Momier’s report during trial.

428. Womble Brief, *supra* note 401, at 101 (transcript of Leathers’ trial testimony). This contradiction appears to be a *Brady* violation. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring that the prosecution provide the defense with all evidence favorable to the defendant that is material to guilt or punishment). During the Commission hearing, the contradiction was noted. Stellato stated that Commission investigators would have wanted to interview Leathers about this contradiction, but Leathers had passed away by the time of the investigation. Womble Hearing Day 1, *supra* note 427, at 126.

429. Womble Brief, *supra* note 401, at 54 (Momier’s SBI report). Womble’s attorney was not present at this meeting. *Id.*

430. *Id.* at 112–13 (transcript of Womble’s trial testimony).

431. *Id.* at 112–13, 125, 127, 129.

432. *Id.* at 114.

433. *Id.*

434. *Id.* at 127. The transcript at one place uses the word “hand” rather than “hang,” which would be nonsense. *Id.* at 114. In a similar statement at another location it is “hang.” *Id.* at 127.

435. *Id.* at 131.

murder because he thought he was in serious trouble on charges he faced in Durham and wanted Leathers' help.⁴³⁶ However, after Womble's Durham case was dismissed, the prosecutor suggested Womble no longer needed help and Womble simply abandoned his confession.⁴³⁷

Womble also provided an alibi during his testimony. He asserted that he and his girlfriend were playing cards with his friends, Leroy and Shirlyn Walters, from about 7:30 p.m. until 11:00 p.m. on the evening of November 18, 1975.⁴³⁸ Both friends testified in support of Womble's alibi, but their testimony was destroyed in cross-examination and the prosecution's rebuttal.

Leroy Walters testified first. He said they were playing cards and watching TV, including a news item about a murder in Butner on the 11:00 news on a local station.⁴³⁹ However, Leroy had to be wrong about the news broadcast on that date since, as the prosecutor noted in cross-examination, the victim did not die until early the morning after the alleged report aired.⁴⁴⁰ In her testimony, Shirlyn Walters said the news item on November 18 only mentioned a shooting in Butner,⁴⁴¹ but she described the report as showing pictures of the convenience store and sheriff's cars.⁴⁴² When challenged during cross-examination that the pictures were not shown until November 19, she asserted that Womble was there playing cards both nights and that she remembered because November 18 was just before her birthday.⁴⁴³ In rebuttal, the prosecution called an employee of the local TV station who read the anchor's script from November 18 regarding a shooting in Butner, which was not accompanied by video and testified that the broadcast the next evening reported the murder and had video.⁴⁴⁴

The jury convicted Womble of first-degree murder after deliberating for only fifteen minutes.⁴⁴⁵ When asked by the judge at sentencing if there was anything he wanted to say, Womble asserted

436. *Id.* at 120.

437. *Id.* at 126.

438. *Id.* at 16–18, 114.

439. *Id.* at 143.

440. *Id.* at 144, 147–49.

441. *Id.* at 149–50.

442. *Id.* at 153.

443. *Id.* at 152–53.

444. *Id.* at 161.

445. *Id.* at 168.

repeatedly that he had nothing to do with the crime.⁴⁴⁶ Womble was sentenced to life in prison.⁴⁴⁷

4. The Joseph Perry Trial

Womble's co-defendant Joseph Perry was tried November 3–4, 1976. The victim's daughter could not identify Perry, but he was linked to the murder through forensic comparison of a spent shell casing recovered from the Butner Food Mart about ten days after the murder and one recovered from a Durham convenience store robbery several weeks before the murder. The victim of the Durham robbery, who was shot but survived, also identified Perry as the perpetrator of that crime.⁴⁴⁸ Finally, Perry was linked to a car at the murder scene, but not the white Ford referenced in Womble's confession. Witnesses testified to Perry's use of a black Cadillac.⁴⁴⁹ A witness who drove through Butner during the time of the robbery testified to noticing a 1966 or 1967 black Cadillac, which he had not seen before, sitting in the grass between the Food Mart and the nearby bank.⁴⁵⁰ Perry was convicted of first-degree murder.⁴⁵¹

5. Commission Investigation and Proceedings

The Commission became involved on April 4, 2013, when it received a letter from Joseph Perry stating that Womble was completely innocent of the Bullock homicide. In the letter, Perry explained that the only person with him on the night of the homicide was Albert Willis, who was the person the victim's daughter described as the "short guy."⁴⁵² He explained that he had delayed exposing Womble's innocence until after Willis died. Another reason he delayed disclosing this information was that he initially harbored anger against Womble for giving information implicating Perry in the murder. Willis also expressed uncertainty about how Womble would have gotten any information since he was not in their circle. Perry assumed Womble might have been tricked because Womble had "a

446. *Id.* at 169.

447. *Id.* at 171.

448. *Id.* at 176.

449. Perry was arrested while driving a black Cadillac registered to him and Albert Willis. *Id.* at 39 (Momier's SBI report). In his testimony before the Commission, Perry testified that he was driving his black two-door Cadillac the night he committed the homicide. Womble Hearing Day 1, *supra* note 427, at 41–42.

450. Womble Brief, *supra* note 401, at 177.

451. *Id.* at 178.

452. *Id.* at 188 (Perry's letter). The victim's daughter had described that man as being five feet six inches to five feet seven inches. *Id.* at 22 (Momier's SBI report).

degree of retardation.”⁴⁵³ After receiving this letter, Commission staff interviewed Womble who, under the Commission statute, had to initiate a claim.⁴⁵⁴

Unlike most of its cases, forensic evidence was not central to the conviction or the Commission’s investigation. The closest one gets to that type of tangible proof in this case is the chart on suspect heights. Perry was six feet one inch tall and Albert Willis was five feet six inches tall, which would make their heights very consistent with the initial height description given by the victim’s daughter. Womble was five feet ten inches, which is shorter than Perry, but not markedly so, nor would it make him “short.”

Frequently in its investigations, the Commission locates police and prosecution files, but in this case, these agencies’ files could not be located. The Commission was, however, able to obtain the SBI investigative file, which contained the investigative report described earlier, as well as lab reports, crime scene photos, and some other case-related documents.⁴⁵⁵ Much of the Commission’s investigation involved an effort to evaluate the credibility of Perry’s statements. Investigator Sharon Stellato testified that in her ten years of innocence work, receiving a letter from a co-defendant admitting to guilt was unusual.⁴⁵⁶ In Perry’s initial interview, Perry stated that he, rather than Willis, fatally shot the victim. This was consistent with the witness’ description of the height of the gunman. Moreover, Perry did not attempt to blame Willis as the triggerman in order to obtain better treatment.⁴⁵⁷ In addition to no longer having to keep his word not to incriminate Willis after his death,⁴⁵⁸ Perry indicated a reason to tell his story now was that someday he wanted to write a book and he had to tell the truth in it.⁴⁵⁹

Stellato obtained from Perry the names of people Perry had spoken to over the years about who was involved in the Butner murder.⁴⁶⁰ Stellato summarized for the commissioners a series of

453. *Id.* at 189–90 (Perry’s letter).

454. Womble Hearing Day 1, *supra* note 427, at 10.

455. Womble Brief, *supra* note 401, at 9. The Commission requested files from the Granville County District Attorney’s office, the Butner Public Safety Division and the Durham Police Department, but none could be found. The defense attorneys for Womble and Perry no longer had records. The Granville County Clerk’s office had case files that contained the trial transcript. *Id.* at 9.

456. Womble Hearing Day 1, *supra* note 427, at 11–12.

457. *Id.* at 15.

458. Perry told Stellato that if Willis were still alive, he would not be coming forward. *Id.* at 22.

459. *Id.* at 17.

460. *Id.* at 18–19.

contacts that generally supported Perry's exculpation of Womble. Consistent with the Commission's principle of presenting the full picture, she reported that one person she contacted said that Perry had told him Perry was innocent and that Womble committed the murder.⁴⁶¹ Without Perry's knowledge, the Commission monitored his jail telephone calls and mail and presented those communications at the hearing.⁴⁶² None of these communications conflicted with Perry's statements that Womble was innocent, but rather supported it.⁴⁶³ Investigators also located one of Willis' co-defendants from an armed robbery. This individual, who was in federal prison, reported that Willis had told him Womble was not involved in the Bullock homicide. He said that Perry and Willis were doing armed robberies together at that time. He said Perry and Womble "were two different kinds of people," and Perry would never have used Womble in the crime.⁴⁶⁴

When asked whether Womble was a lookout in the Bullock murder, Perry explained that Womble was "not in my circle. He [didn't] travel with me . . ." ⁴⁶⁵ He said Womble doesn't know "one actual fact about this crime." ⁴⁶⁶ Moreover, Perry stated that he was not using lookouts for the armed robberies at that point because of a bad experience with one who "chickened out." ⁴⁶⁷ Perry repeatedly characterized Womble as "slow" ⁴⁶⁸ or "retarded." ⁴⁶⁹ He also explained that he delayed exculpating Womble because Womble had inserted himself into the case and brought this on himself. ⁴⁷⁰

Shirlyn Walters, one of Womble's alibi witnesses, also testified and continued to assert that he was with her and her husband on the evening of the murder. ⁴⁷¹ Her testimony to the Commission appeared

461. *Id.* at 29–30 (describing interview of James Sneed).

462. *Id.* at 101.

463. Telephone Calls Placed by Joseph Perry, *State v. Womble*, 75-CRS-06128 (N.C. Super. Ct. June 3, 2014), <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/Handouts%20Given%20to%20Commissioners%20During%20The%20Hearing.pdf> [<https://perma.cc/L37M-5TGC>] (transcripts of relevant portions of Perry's prison phone calls located in a scanned collection of handouts presented at the Commission hearing).

464. *Womble Hearing Day 1*, *supra* note 427, at 117–24 (describing interview of Lonnie Adams).

465. *Id.* at 58–59.

466. *Id.*

467. *Id.* at 73–74. Perry stated that on that occasion he accidentally shot himself, which he attributed to using the lookout. *Id.*

468. *Id.* at 50.

469. *Id.* at 51.

470. *Id.* at 59.

471. Leroy Walters, the other alibi witness, had passed away by the time of the Commission hearing. Transcript of Record Day Two at 4, *State v. Womble*, 75-CRS-06128

to suffer from the passage of over thirty years and her advanced age. Walters emphasized that November 19 was her birthday and that, in addition to the television news reference, she remembered Womble being with her the day before as she prepared for her birthday.⁴⁷² Walters' testimony could only go so far in supporting innocence. The one absolutely clear point, however, was that she sincerely believed Womble was with her and her husband at the time of the murder.

The Commission obtained Womble's school records. They showed very poor performance with Ds and Fs in most courses, even while in special education.⁴⁷³ In addition, on two occasions he missed periods of school—one quite substantial—due to being burned. The first occurred when he was badly burned by hot water at age eight or nine, while the second was the result of a prank when lighter fluid was poured on him and set afire.⁴⁷⁴ A series of IQ tests showed scores between sixty-six and seventy-four.⁴⁷⁵ According to an evaluation in 1972, “[s]chool achievement scores are upper [second] grade level and for all practical purposes Willie is illiterate.”⁴⁷⁶

Stellato interviewed Womble in addition to his testimony before the Commission. As he did at the time of sentencing, and consistently in interviews with prison and parole officials,⁴⁷⁷ Womble maintained his innocence.⁴⁷⁸ Despite his consistent position of innocence, Womble had not filed previous legal challenges to his conviction or initiated an innocence inquiry. This inaction is best explained by his

(N.C. Innocence Inquiry Comm'n June 3, 2014) [hereinafter Womble Hearing Day 2], <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/NCIIC%20Hearing%20Transcript%20-%20State%20v.%20Womble.pdf> [https://perma.cc/TD22-EUWB] (proceedings of day two listed immediately after day one).

472. *Id.* at 14.

473. Womble Hearing Day 1, *supra* note 427, at 162–63. *See* Willie Womble's School Records, *State v. Womble*, 75-CRS-06129 (N.C. Super. Ct. June 3, 2014), <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/Handouts%20Given%20to%20Commissioners%20During%20The%20Hearing.pdf> [https://perma.cc/L37M-5TGC] (located in a scanned collection of handouts presented at the Committee hearing).

474. Womble Hearing Day 1, *supra* note 427, at 164–65. Perry also testified about the second incident. *Id.* at 50–51.

475. Department of Public Service (DPS) Records: Willie Henderson Womble, *State v. Womble*, 75-CRS-06128 (N.C. Super. Ct. June 3, 2014), <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/Handouts%20Given%20to%20Commissioners%20During%20The%20Hearing.pdf> [https://perma.cc/L37M-5TGC] (record entitled “IQ” located in a scanned collection of handouts presented at the Committee hearing).

476. *Id.* (report entitled “Literacy/Functioning,” dated 2/10/72).

477. *Id.* (report entitled “Statements Related to Crime”). A typical quotation from Womble's statement of May 13, 1992, reads as follows: “According to Inmate Womble's version, he did not actually commit the murder, but due to the fact that he would not testify against his co-defendant, he was charged with the crime.” *Id.*

478. Womble Hearing Day 1, *supra* note 427, at 138.

limited intellectual functioning in combination with his passivity and lack of close family support.⁴⁷⁹

In his testimony to the Commission, Womble gave the same rough version presented during his trial testimony that he at no time offered information to Leathers or others in exchange for favorable treatment. Instead he claimed that he made the statements because of coercion, stating that he was grabbed and thrown onto the floor.⁴⁸⁰ Whether Womble's explanation that he provided no information about the crime to the police and that his statement was physically coerced appears questionable given the number of different statements Momier reports that Womble gave to different officers and the prosecutor indicating some knowledge about the crime with varying degrees of his own involvement. However, the inculpatory portions of his statements were always minimal and likely not at all understood by him in terms of legal significance. Moreover, all the versions were clearly inconsistent with established facts and facts relied on by the prosecution in Perry's trial. Perhaps a more plausible explanation is that his incriminating statements were those of a hapless and expendable would-be informant caught up in the prosecution of a very dangerous murderer.⁴⁸¹ In any case, when examined together the statements provided no real proof of Womble's involvement in the crime.

6. Commission Decision

At the close of the hearing, the commissioners voted unanimously that there was sufficient evidence of factual innocence to merit judicial review.⁴⁸²

7. Three-Judge Panel Proceedings and Decision

The three-judge hearing, which was held on October 17, 2014, was abbreviated since the parties agreed to rest on the Commission's

479. *Id.* at 144–46 (Stellato recounting that Womble “said half of his family had passed away, and that the others had gone their own way, that he didn’t want to worry them or his sister . . .” and her (Stellato’s) conversation with him was the first time anyone had ever come to talk to him about his case).

480. Womble Hearing Day 2, *supra* note 471, at 56. Womble indicated that he did not remember at this point in time whether Leathers had his handwritten statement completed or whether he wrote it while talking to Womble. *Id.*

481. Based on past conduct, Leathers had correctly identified as likely perpetrators both Perry and Willis, with Womble being simply associated with them. Womble Brief, *supra* note 401, at 25 (Momier’s SBI report). His information provided the targets and a potentially knowledgeable witness.

482. Womble Hearing Day 2, *supra* note 471, at 93.

Brief, Transcript of the Commission Hearing, Handouts, and Opinion.⁴⁸³ In its argument, the defense emphasized a few points regarding the falsity of the confession: first, that Womble was mentally handicapped and could not read; second, that no white car was involved, the state introduced in Perry's trial that he used a black Cadillac; and third, that the witnesses only saw two robbers rather than the three active participants in Womble's statement.⁴⁸⁴

District Attorney Samuel B. Currin, III, who was not involved in the initial prosecution, took no issue with the defense arguments, adding that the Durham detectives had "effectively rounded up the usual suspects" and "[u]nfortunately, Mr. Womble caught the brunt of this, and I think it is because he was mentally challenged and didn't know what he was signing."⁴⁸⁵ In conclusion, Currin said that in reviewing the Commission materials he had "read well over a thousand pages of material, and . . . could find nothing in those pages to indicate any evidence of guilt against Mr. Womble."⁴⁸⁶ He urged the judges to dismiss the charges "because he is factually innocent."⁴⁸⁷ The prosecutor's statement that the lengthy Commission examination of the evidence in the case revealed no evidence of guilt was right on target.

The three-judge panel immediately reached a unanimous decision to vacate Womble's conviction and ordered his release.⁴⁸⁸

The *Womble* case is one of the simplest of the exonerations by the Commission. It demonstrates one of the strengths of the Commission's statutory and operational structure in that it relied in no way on dispositive scientific evidence. This case involved painstaking examination of all the evidence by the Commission, which revealed no evidence of guilt other than Womble's facially questionable confession. Its work to test Perry's exculpation of Womble demonstrated that it withstood reasonable scrutiny. The neutrality and professionalism demonstrated by the Commission and its investigators over the course of a number of cases likely made the District Attorney's decision to support exoneration palatable. Womble's exoneration highlights important virtues of the

483. Womble Hearing Day 2, *supra* note 420, at 3–5.

484. *Id.* at 6–7.

485. *Id.* at 12.

486. *Id.* at 16.

487. *Id.* at 17.

488. *Id.* at 18. See *State v. Womble*, 75-CRS-06128 (N.C. Super. Ct. Oct. 17, 2014), <http://www.innocencecommission-nc.gov/Forms/pdf/Womble/Three%20Judge%20Panel%20Opinion%20-%20State%20v.%20Womble.pdf> [https://perma.cc/WL7K-JWWK] (decision of the three-judge panel).

Commission's structure. The next case shows a different strength—the ability to use the Commission's investigative prowess and credibility through the traditional post-conviction process.

E. The Leon Brown and Henry McCollum Case

As described in a bit more detail below, the *Brown & McCollum* cases followed a different procedural path than the other exonerations. Although the Commission had not completed its investigation, lawyers representing Brown and McCollum, with the cooperation of current District Attorney Johnson Britt,⁴⁸⁹ chose to present the evidence they had developed at a previously scheduled hearing on a motion for post-conviction relief. On the basis of the evidence of innocence presented at that hearing, the court granted relief, and no Commission hearing was held.

This case involved a wrongful conviction based centrally on false confessions obtained from two intellectually disabled half-brothers, which was corrected largely as a result of advances in DNA forensic analysis. The work of the Commission investigators demonstrated both the importance of a comprehensive investigation, here particularly examining past criminal activity of an alternate suspect, and the investigative staff's developed sophistication in employing advances in forensic technology. Although the discoveries did not play a role in the outcome, the Commission demonstrated again its ability to locate evidence that was reported missing. Reliance upon informants for tips and testimony played its frequent damaging role in this case. Finally, this case is an extraordinary example of “tunnel vision” and the cost of prosecuting the innocent, which leaves the real perpetrator free to commit crime again.

1. The Crime

Just after midnight on Sunday morning, September 25, 1983, when returning from working a night shift, Ronnie Buie discovered that his eleven-year-old daughter, Sabrina Buie, was missing.⁴⁹⁰ She

489. The district attorney at the time of the exoneration was Johnson Britt. A different district attorney, Joe Freeman Britt, prosecuted and secured the convictions of Brown and McCollum decades earlier. See *infra* text accompanying note 507. The two prosecutors are distant relatives in that Johnson Britt's grandfather was first cousin to Joe Freeman Britt's father. See Richard A Oppel, Jr., *As Two Men Go Free, A Dogged Ex-Prosecutor Digs In*, N.Y. TIMES (Sept. 7, 2014), <http://www.nytimes.com/2014/09/08/us/as-2-go-free-joe-freeman-britt-a-dogged-ex-prosecutor-digs-in.html> [<https://perma.cc/4A9F-V93U>].

490. State v. McCollum, 334 N.C. 208, 218, 433 S.E.2d 144, 149 (1993).

had last been seen at 11:00 p.m.⁴⁹¹ The next day, Buie's mostly naked body was found in a soybean field.⁴⁹² A stick and a pair of underpants were wedged in her throat and completely blocked the airway. She had died of asphyxiation.⁴⁹³

Detectives interviewed a number of young people in the community during the first two days after Buie's body was discovered, including two individuals who became suspects, Darrell Suber⁴⁹⁴ and Henry McCollum.⁴⁹⁵ One witness, L.P. Sinclair, was also interviewed.⁴⁹⁶ None of these interviews produced leads or incriminating information. McCollum, for example, told Detective Garth Locklear of the Robeson County Sheriff's Department that the last time he had seen Buie was around noon on Saturday at the Short Stop convenience store. He described his activities on Saturday night with no indication of any involvement in the crime.⁴⁹⁷ Then, on September 28, 1983, SBI Agent Ken Snead and Detective Ken Sealey of the Red Springs Police Department received a tip from seventeen-year-old Ethel Frumage. She told them that she heard at school that "Buddy," which was McCollum's nickname, killed Buie.⁴⁹⁸

SBI Agent Leroy Allen, Snead, and Detective Sealey went to McCollum's home that evening and interviewed him there for a few minutes. They then took him to the Red Springs Police Department, arriving at about 9:20 p.m. McCollum, who was nineteen years old,

491. Motion for Appropriate Relief Transcript at 81, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) [hereinafter Motion for Appropriate Relief Transcript] (on file with the *North Carolina Law Review*).

492. *McCollum*, 334 N.C. at 218, 433 S.E.2d at 149. The autopsy report stated the body was "clothed only in a dirty beige bra which [was] still fastened and [had] been pulled up over her head so that it [was] wrapped around her arms and behind her neck." Exhibit 10, Autopsy Report, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

493. *McCollum*, 334 N.C. at 218, 433 S.E.2d at 149.

494. Suber, who was eighteen, was interviewed on September 26, 1983, by Detective Garth Locklear and Agent Parker, and re-interviewed on September 28, 1983, by Parker and Edwards. Exhibit 8, Suber Interview Report, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

495. McCollum, who was nineteen, was interviewed by Locklear on September 27, 1983. Exhibit 8, McCollum First Interview Report, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

496. Sinclair, who was sixteen, was first interviewed on September 26, 1983, by Locklear, Officer Floyd, and Agent Parker. Exhibit 29, Sinclair Interview Reports, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

497. Exhibit 11, McCollum First Interview Report, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

498. Exhibit 14, Frumage First Interview Report, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

was fingerprinted, and Snead talked with him about two unrelated events. At approximately 10:15 p.m., the focus changed. Snead told McCollum that his name had come up in the investigation of Buie's death. McCollum ultimately gave two oral statements, which Snead wrote down. These statements were signed by McCollum at 1:37 a.m. and 2:10 a.m.⁴⁹⁹ After giving the statement, which admitted guilt to a horrible rape and murder, McCollum got up, expecting to be able to leave, but was told he was under arrest.⁵⁰⁰

In McCollum's statement, he named his fifteen-year-old half-brother, Leon Brown, as one of the participants in the rape and murder. Locklear, along with Red Springs Police Chief Haggins, interviewed Leon Brown that night beginning at 2:35 a.m. Locklear wrote this statement down, as well as a later shorter statement regarding what Brown had told his mother about the crime. Brown signed both. In these statements, Brown admitted to the murder.⁵⁰¹

Investigators soon learned that the Frumage tip rested only on speculation. On October 3, 1983, Agent Lee Sampson and Agent Parker re-interviewed Frumage, who told them:

she did not have any personal knowledge that HENRY LEE MCCOLLUM was involved in the crime in question and she had not received any information that he was. She suspected that he was involved because he is crazy, noting that he just does not act right. She has noticed in the past that he stares at people, mostly women, and that he rides up the road on a bicycle looking.⁵⁰²

2. The Trials

In October 1984, Brown and McCollum were tried together in Robeson County on charges of first-degree murder and rape. They were convicted of both charges and were each sentenced to be executed for murder and to life imprisonment for rape. After reversal of the convictions for both defendants,⁵⁰³ Brown was retried in Bladen

499. Exhibit 5, McCollum Confession, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

500. Motion for Appropriate Relief Transcript, *supra* note 491, at 19.

501. *Id.* at 19–20. Exhibit 6, Brown Confession, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (the report states the time of the interview as 2:24 a.m.) (on file with the *North Carolina Law Review*).

502. Exhibit 15, Second Frumage Interview Report, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

503. *State v. McCollum*, 321 N.C. 557, 563, 364 S.E.2d 112, 115 (1988). The cases were reversed because of an error in jury instructions. The jury instructions could have been

County and convicted of first-degree rape largely on the basis of his confession. This conviction was affirmed on appeal.⁵⁰⁴ McCollum was retried in Columbus County in November 1991. He was again convicted of rape and murder and sentenced to death, and his convictions and death sentence were affirmed.⁵⁰⁵ The principal evidence against McCollum was his confession. L.P. Sinclair, a sixteen-year-old acquaintance of Brown and McCollum, also testified that he heard McCollum and Brown planning to rape Buie and that McCollum later described the murder.⁵⁰⁶

In securing the conviction, former District Attorney Joe Freeman Britt dramatically emphasized the horror and brutality Buie experienced:

I asked (the jury) to time with me five minutes, and I just sat down. I asked them, if they wanted to, to try to hold their breath as long as they could and to think about, to do—to do the things that the law required them to do—that is, reflect upon and analyze and think about the facts of the case, to think about the little girl in the woods and, what horrible experiences she had there, how they sodomized her and raped her and kicked her and beat her and cursed her, all the time her begging for mommy. It was a long five minutes.⁵⁰⁷

3. Commission Investigation

As noted above, the Commission's involvement in this case differed from the other six. The Commission developed its investigation on behalf of Leon Brown, who wrote to the Commission in 2009, and as required by the Commission statute, waived all his privileges.⁵⁰⁸ Brown's case was moved into the formal inquiry stage in

interpreted as permitting the conviction of both defendants if the evidence established beyond a reasonable doubt the guilt of either. *Id.* at 559–60, 364 S.E.2d at 113.

504. *See State v. Brown*, 112 N.C. App. 390, 394, 436 S.E.2d 163, 166 (1993) (affirming conviction and admission of confession), *aff'd*, 339 N.C. 606, 606, 453 S.E.2d 165, 165–66 (1995).

505. *State v. McCollum*, 334 N.C. 208, 217–18, 245, 433 S.E.2d 144, 148, 164 (1993).

506. *Id.* at 232, 433 S.E.2d at 157. Sinclair testified at the initial joint trial of Brown and McCollum, and after his death, his prior testimony was introduced in McCollum's retrial. Motion for Appropriate Relief Transcript, *supra* note 491, at 52–53.

507. Joseph Neff, *DNA Evidence Could Free 2 Men in 1983 Case*, CHARLOTTE OBSERVER (Sept. 2, 2014, 2:45 PM), <http://www.charlotteobserver.com/news/local/crime/article9159632.html> [<https://perma.cc/89MR-NTNW>] [hereinafter Neff, *DNA Evidence Could Free Two Men*]; Joseph Neff, *New DNA Evidence Could Free Two Men in Notorious Robeson County Case*, NEWS & OBSERVER (Aug. 30, 2014, 8:00 PM), <http://www.newsobserver.com/news/local/crime/article10043633.html> [<https://perma.cc/7R6P-YCW4>].

508. Motion for Appropriate Relief Transcript, *supra* note 491, at 8–9.

2010 based on investigator Sharon Stellato's initial review, which revealed substantial inconsistencies between the confessions of Brown and McCollum, and on the Commission's decision to do additional DNA testing of the physical evidence.⁵⁰⁹

a. The Confessions' Internal Inconsistencies and Conflict with External Evidence

Stellato noted inconsistencies between the confessions of McCollum and Brown regarding the initial encounter with Buie, how the events took place and who participated, and where and how the killers disposed of the body.⁵¹⁰ For example, while McCollum identified Louis Moore as a participant, Brown's statement did not mention him.⁵¹¹ McCollum's statement said the boys dragged the victim's body across the field, while Brown's confession said they carried it.⁵¹² On this point, Brown's statement was inconsistent with the physical evidence, as the medical examiner found shallow linear scratches and abrasions on Buie's body, which indicated it was dragged along the ground.⁵¹³

In addition to the inconsistencies between the confessions of the two defendants, Stellato found numerous inconsistencies between McCollum's statement and the corroborated information and physical evidence. Besides Louis Moore, McCollum also said Darrell Suber was involved in the murder. However, police later learned that Moore had been in Kentucky since June 1983, where he was in school.⁵¹⁴ Suber told the police that he was in another town on the night of the crime, and his alibi was confirmed by other witnesses.⁵¹⁵ McCollum's confession was also inconsistent with the physical evidence in two ways. First, he said Buie's underpants were pink, but the autopsy recorded that they were white. Second, McCollum said that Suber had stabbed the victim with a knife he carried, but the medical examiner found no stab wounds in the body.⁵¹⁶

509. *Id.* at 10.

510. *Id.* at 15.

511. *Id.* at 16.

512. *Id.* at 17.

513. *Id.* at 17–18.

514. *Id.* at 11.

515. *Id.* at 11–13. District Attorney Johnson Britt asked Stellato whether her investigation showed that law enforcement knew in 1983 that Moore was living and residing in another state at the time of the crime and that Suber's alibi was established for the night of the murder. She responded yes to both. *Id.* at 112–13.

516. *Id.* at 14.

b. Other Questionable Features of the Confessions

Brown and McCollum were young, fifteen and nineteen, respectively, and both were intellectually disabled. Testing in 1983 showed that Brown had a full-scale IQ of fifty-four, and McCollum had been shown to have an IQ of fifty-six. When he was fifteen, McCollum was placed in a special school for the emotionally and intellectually disabled.⁵¹⁷

Commission investigators also recognized the potential for contamination of the confessions through information known by an interrogator. SBI Agent Allen was one of the officers present during McCollum's interrogation and had broad inside knowledge of crime details. When Buie's body was found, Allen was the crime scene technician called to that location to process the area for evidence. He also attended the autopsy the next day.⁵¹⁸

c. Testimony of L.P. Sinclair Regarding Incriminating Statements by Brown and McCollum

At Brown and McCollum's joint trial and McCollum's retrial, L.P. Sinclair testified that McCollum and Brown made statements regarding planning Buie's rape and McCollum made statements after the crime about the murder. Because Sinclair died in 1990, he could not be asked about this testimony. However, the SBI investigative report contains law enforcement interviews of Sinclair in late September and early October 1983 in which he stated several times that he knew nothing about the murder. Indeed, he was given and passed a lie detector based on his statement that he had no knowledge of the crime.⁵¹⁹ Moreover, these clearly inconsistent statements were not disclosed to defense counsel when Brown and McCollum were tried.⁵²⁰

517. *Id.* at 86–87. In McCollum's 1991 trial, the jury found as a mitigating circumstance that he was "mentally retarded." Exhibit 40, Issues and Recommendations as to Punishment, *State v. McCollum*, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*); Neff, *New DNA Evidence Could Free Two Men*, *supra* note 507 (describing McCollum as having an IQ in the sixties and Brown scoring as low as forty-nine).

518. Motion for Appropriate Relief Transcript, *supra* note 491, at 24. As a result, Allen knew facts about the case including that a stick and underpants had been stuffed down Buie's throat and the physical layout of the crime scene. *Id.* at 89.

519. *Id.* at 52–54, 118–19; Exhibit 29, Sinclair Interview Reports, *supra* note 496.

520. Motion for Appropriate Relief Transcript, *supra* note 491, at 53 (nothing about it presented at trial); Richard A. Opel, Jr., *supra* note 489 (describing Britt's concern that the failure to turn over this evidence to defense counsel constituted a violation of the requirements of *Brady v. Maryland*, 383 U.S. 37 (1963), which requires disclosure of evidence material to the defendant's innocence).

d. Further DNA Testing

Before the Commission began work on Brown's case, a Newport cigarette butt, which the prosecution believed had been left by the killers because it was found near blood-stained sticks and some beer cans,⁵²¹ had been examined for DNA. In 2005, the test produced a partial DNA profile, which excluded McCollum as the source of the DNA.⁵²² In 2010, the Commission asked LabCorp to compare Brown's DNA profile to the results obtained in 2005, and Brown was also excluded.⁵²³

In 2011, the Commission asked LabCorp to "reamplify the DNA extracts" using a different, more advanced test kit. With the new test, LabCorp developed a partial DNA profile at eleven of the locations tested. This retesting once again excluded McCollum and Brown as the source of the DNA.⁵²⁴ While results had been obtained at eleven locations, LabCorp indicated that the profile developed with this test kit was likely ineligible for uploading into CODIS for a search against profiles in the state's database.

In 2014, the Commission had a breakthrough regarding the DNA. Early in the year, the Commission began a process of requesting that the above profile be uploaded into CODIS. In April 2014, the State Crime Lab agreed, and it uploaded the profile in June. The next month, the Commission received notice of a CODIS hit matching the DNA profile of Roscoe Artis.⁵²⁵

521. Buie's fingerprint was identified on one of the beer cans. Motion for Appropriate Relief Transcript, *supra* note 491, at 50–51.

522. *Id.* at 29–30 (describing the test as conducted under a court order requested by McCollum's lawyer and consented to by Britt); Exhibit 18, Certificate of Analysis, State v. McCollum, 83-CRS-15506 (N.C. Super. Ct. Sept. 2, 2014) (certificate of analysis dated Jan. 26, 2005) (on file with the *North Carolina Law Review*).

523. Motion for Appropriate Relief Transcript, *supra* note 491, at 30–31; Exhibit 19, 2010.12.31 LabCorp Report at 2, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (supplemental certificate of analysis from LabCorp) (on file with the *North Carolina Law Review*).

524. Motion for Appropriate Relief Transcript, *supra* note 491, at 31; Exhibit 20, 2011.08.01 LabCorp Report at 3, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (certificate of analysis from LabCorp) (on file with the *North Carolina Law Review*). In 2014 after the Commission obtained Darrell Suber's DNA, it was compared with the partial profile obtained from the cigarette butt, and Suber was also excluded. Motion for Appropriate Relief Transcript, *supra* note 491, at 31–32; Exhibit 21, 2014.05.21 Cellmark Report at 1, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

525. Motion for Appropriate Relief Transcript, *supra* note 491, at 32–33; Exhibit 22, 2014.07.10 Report of CODIS Hit at 1, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (report of CODIS hit on Artis) (on file with the *North Carolina Law Review*).

The Commission conducted further testing. Investigators visited Artis in prison and voluntarily obtained DNA swabs for two testing kits. One kit was sent to the State Crime Lab to develop a DNA profile that the Commission could compare directly to the profile from the cigarette butt. That testing confirmed that the partial DNA profile from the cigarette butt was consistent with Artis' DNA profile.⁵²⁶ The second kit was sent to Cellmark Forensic for Y-STR testing. Y-chromosome testing looks at DNA that belongs only to males. Cellmark was asked to do Y-STR testing on the cigarette butt, and it obtained a partial profile at eleven locations. That partial profile was also consistent with Artis' Y-STR profile.⁵²⁷

Cellmark developed probability statistics of a random match with an unrelated individual based on the partial DNA profiles. Roscoe Artis is African American,⁵²⁸ and among African Americans, based on the short tandem repeat ("STR") testing alone, the probability is 1 in 1.85 billion. When combined with the result for the Y-STR testing, the random match probability is 1 in 4.23 trillion.⁵²⁹

e. Commission Efforts to Locate Evidence

After a protracted process that began in 2010 and culminated in 2014 when Stellato went to the Red Springs Police Department, a search resulted in the discovery of a box of evidence and documents from the case, and the Commission took possession of those items.⁵³⁰

526. Motion for Appropriate Relief Transcript, *supra* note 491, at 33–35.

527. *Id.* at 34–35; Exhibit 23, 2014.07.29 Cellmark Report at 2–3, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (report of laboratory examination conducted by Cellmark Forensics) (on file with the *North Carolina Law Review*).

528. Motion for Appropriate Relief Transcript, *supra* note 491, at 58.

529. *Id.* at 34–35; Exhibit 37, Statistics on Artis DNA Hit at 1, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*). The probability in the Caucasians and Hispanic populations is far smaller. It is 1 in 69,471,600,000,000 among Caucasians and 1 in 156,927,850,000,000 among Hispanics. *Id.* at 2. The STR probability for the North Carolina Lumbee Indian population is 1 in 12.6 billion without combining Y-STR testing. Motion for Appropriate Relief Transcript, *supra* note 491, at 35.

530. The Commission has statutory authority to obtain records and evidence. See N.C. GEN. STAT. § 15A-1471(c) (2015). In June 2010, the Commission obtained a court order to preserve and produce evidence from the Red Springs Police Department, and in August 2010 an order for production of law enforcement files maintained by that department. Both were sent to the department. Motion for Appropriate Relief Transcript, *supra* note 491, at 55; see also Exhibit 42, 2010.06.18 Order to Preserve and Produce Evidence, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*); State v. Brown, 83-CRS-15822, 83-CRS-15823, Order (Oct. 21, 2010); State v. Brown, 83-CRS-15822, 83-CRS-15823, Order (June 10, 2010); Exhibit. 43, 2010.10.21 Order for Production of Law Enforcement Files, State v.

Between 2010 and 2014, a large number of items from the Robeson County Clerk of Court's Office and the Red Springs Police Department were sent for DNA testing, including the victim's underpants, bra, shirt, pants, shoes, and hairs found in various locations, and fingerprints. Forensic testing indicated that no DNA from Brown, McCollum, or any of the others named in Brown and McCollum's confessions was on any of the items of physical evidence. Unfortunately, no other results besides the DNA on the cigarette butt were sufficient to establish a match.⁵³¹

f. Other Investigation of Roscoe Artis

Early Commission investigation of Artis showed that, at the time of the Buie rape and murder, he was living in a house very near the soybean field where her body was found.⁵³² On October 22, 1983, less than a month after the rape and murder of Buie, Joann Brockman was also raped and murdered in Red Springs, and Artis was convicted

McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*). In November 2010, Stellato spoke with Captain Locklear of the Red Springs Police Department who told her that his department had no physical evidence, files, or reports and had turned everything from the investigation over to the SBI. In a fax the next day, Locklear said that all reports had been turned over to the SBI and they could not locate any evidence or files in the case. Motion for Appropriate Relief Transcript, *supra* note 491, at 55. However, Stellato found in the SBI files a 1995 report that stated a box of evidence and document had been located at the Red Springs Police Department, which the department had been instructed to retain. Phone calls in 2014 to the department produced nothing regarding that lead, so Stellato went to the Red Springs Police Department. After some discussion with Captain Locklear about the 1995 SBI report, he agreed to search again and found the box of evidence and documents. Motion for Appropriate Relief Transcript, *supra* note 491; Exhibit 32, 1995 Memo on Law Enforcement Files at 3, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

531. Motion for Appropriate Relief Transcript, *supra* note 491, at 57–69; Exhibit 24, Commission Forensic Chart, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (cataloging various pieces of evidence collected from the crime scene) (on file with the *North Carolina Law Review*); Exhibit 38, 2014.08.29 Cellmark Report at 1–3, State v. McCollum, 83-CRS-15506, 83-CRS-15507, 91-CRS-40727 (N.C. Super. Ct. Sept. 2, 2014) (listing various pieces of evidence collected from the crime scene) (on file with the *North Carolina Law Review*). The crime lab indicated that the one unidentified fingerprint of value was compared to Artis but was inconclusive, which could be because the natural aging process negatively affects ridge detail. Motion for Appropriate Relief Transcript, *supra* note 491, at 67.

532. Artis was living in his sister Pauline Smith's house, which was located just on the other side of a tree line from the soybean field. Motion for Appropriate Relief Transcript, *supra* note 491, at 36–37; *see also* Exhibit 17, Aerial Photo of Red Springs, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*); Exhibit 41, Map of Crime Scene Area, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, Sept. 2, 2014) (on file with the *North Carolina Law Review*).

of that crime.⁵³³ The similarities between the crimes were substantial. Brockman's body was found outdoors and was naked except for her sweater and bra pushed up above her breasts. She died of asphyxiation as a result of manual strangulation.⁵³⁴ Although not as young as Buie, Brockman was only eighteen.⁵³⁵

Locklear, the detective who took the confession from Brown, was lead investigator in the Brockman murder.⁵³⁶ The SBI file reviewed by Commission investigators revealed that Artis was a possible suspect in the Buie murder based on a fingerprint comparison request for him made three days before Brown and McCollum's 1984 trial.⁵³⁷ That request was subsequently canceled, apparently without the comparison ever being completed.⁵³⁸

Even before the CODIS hit on Artis, Commission investigators had interviewed him based on physical and temporal proximity of the Buie and Brockman murders. After the DNA result, they did extensive research into his criminal background, which they found replete with violent sexual assaults against females. Investigators found that in 1957 he was convicted of assault on a female with intent to commit rape in nearby Hoke County. In 1967, while on parole, he was convicted of assault on a female in the Lincoln/Gaston County area in another part of the state. In 1974, he was found guilty of assault with intent to commit rape in Gaston County. In that case, Artis tried to take the sixteen-year-old victim into the woods to sexually assault her, but she resisted. He threw her to the ground and was choking her when a passerby interrupted the crime. Finally, Bernice Moss was murdered in Gastonia on August 25, 1980. She was found naked except for her bra and shirt. She had been beaten with a stick and had an object in her throat. Artis was the last person to see

533. Exhibit 27, 2014.08.26 Commission Memo on Artis at 3, *State v. McCollum*, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. 2014) (on file with the *North Carolina Law Review*).

534. *State v. Artis*, 325 N.C. 278, 289, 384 S.E.2d 470, 476 (N.C. 1989), *vacated*, 494 U.S. 1023 (1990).

535. Motion for Appropriate Relief Transcript, *supra* note 491, at 39.

536. *Id.*

537. *Id.* at 47–49; Exhibit 28, SBI Record of Fingerprint Testing Request for Sinclair and Artis, *State v. McCollum*, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (document requesting fingerprint testing for Sinclair and Artis) (on file with the *North Carolina Law Review*); Exhibit 44, Documents Related to the Fingerprint Comparison Request, *State v. McCollum*, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (documents encompassing fingerprint request) (on file with the *North Carolina Law Review*).

538. Motion for Appropriate Relief Transcript, *supra* note 491, at 49–51; Exhibit 28, *supra* note 537, at 3 (handwritten notation on page marked as 00269).

Moss, and was interviewed as a suspect shortly after her body was found. However, he was not charged with that crime until 1984 and was never tried for it because of his conviction and sentence in the Brockman murder.⁵³⁹ Stellato noted basic similarities between a number of these crimes and the Buie murder: they were violent sexual assaults conducted outside in secluded areas, and Artis acted alone.⁵⁴⁰

g. Interviews and Statements by Brown, McCollum, and Artis

During Commission interviews, both Brown and McCollum always maintained their innocence.⁵⁴¹

Commission investigators interviewed Artis four times, and each interview was recorded.⁵⁴² The first interview was conducted in March 2011, after investigators became aware of the Brockman homicide, but before the CODIS hit on Artis. When asked about the Buie murder, Artis stated that he knew nothing about the murder—only that the two guys convicted didn't do it.⁵⁴³

On July 11, 2014, Artis was again interviewed. In this interview, he said that he did not know Buie except for seeing her getting into cars. When told that DNA found at the crime scene matched his DNA profile, Artis said he had never had any contact with Buie. His only explanation for the DNA evidence was that it had been “planted.”⁵⁴⁴

Artis was interviewed for the third time on July 31, 2014. In this interview, he stated that, although he had not said this to Commission investigators in earlier interviews, Buie had come over to his house the day she went missing. His sister wanted Buie to go home, and he relayed that message to her. When she left, Artis said he gave Buie a hat to wear because it was “misting rain.” However, weather reports obtained by Commission investigators showed that there was no rain

539. Motion for Appropriate Relief Transcript, *supra* note 491, at 41–46. Artis was initially sentenced to death in the Brockman murder. *Id.* at 47; Exhibit 27, *supra* note 533.

540. Motion for Appropriate Relief Transcript, *supra* note 491, at 46–47.

541. *Id.* at 69. In 1992, Brown was offered a plea deal to second-degree rape but rejected the offer. Exhibit 35, 2014 Adam Stein Affidavit, State v. McCollum, 83-CRS-15506, 83-CRS-15507 (N.C. Super. Ct. Sept. 2, 2014) (on file with the *North Carolina Law Review*).

542. Motion for Appropriate Relief Transcript, *supra* note 491, at 69–70.

543. *Id.* at 70–71.

544. *Id.* at 71–72.

during the period when the murder occurred.⁵⁴⁵ In this interview, Artis claimed that Buie came to his house every day on her bicycle.⁵⁴⁶

After this interview, Artis wrote to the Commission describing Buie's visit to his house:

My sister said "go home, home, what are you doing out in this rain?" . . . She came and hugged my neck and kissed me on the face. I grab her hand and wrist, and I told her to go home. She's still standing there. I grab her by her bicep and told her to go home. I then put her little face in my hand and told her to go home My sister said, "Give her one of your old cap and jacket. She can bring them back tomorrow . . . So, if any DNA was at the crime scene it came from my jacket and cap" ⁵⁴⁷

In a subsequent interview on August 22, 2014, Artis repeated much of the substance of the letter. However, he said that he was recently speaking with his niece and she told him that she had given Buie these items. When asked why he was for the first time saying it was his niece, rather than his sister, who was involved in giving Buie the jacket and hat, Artis said his niece would confirm her actions and denied ever making a contrary statement. Commission investigators had interviewed family members of Artis, who reported that Buie had never been in Pauline Smith's house where Artis was staying at the time of the murder.⁵⁴⁸ When confronted with these statements, Artis told Stellato that the family members didn't remember.⁵⁴⁹

4. Post-Conviction Motion ("MAR") Proceedings Instead of Commission Hearing

In July 2014, when Leon Brown's case was in the formal inquiry stage, the Commission staff met with the parties to discuss their ongoing investigation. The parties decided to present the Commission's investigation results at an upcoming post-conviction motion hearing that had previously been scheduled in McCollum's case. Brown then filed a motion to join those proceedings and a consolidated hearing of the two cases was held on September 2, 2014. The only witness called was Commission Investigator Sharon Stellato, who presented the results of the Commission's investigation. Despite

⁵⁴⁵ *Id.* at 80. The *Farmer's Almanac* shows the weather for an area by zip code. Stellato noted that it showed "zero percent precipitation" for the relevant period. *Id.* at 82.

⁵⁴⁶ *See id.* at 72.

⁵⁴⁷ *Id.* at 75 (reading the portions of Exhibit 45, the letter from Artis to the Commission relating to Buie, into the record).

⁵⁴⁸ *Id.* at 79.

⁵⁴⁹ *Id.* at 78.

McCollum never filing a claim with the Commission,⁵⁵⁰ Stellato's presentation concerned both defendants. She explained that the two cases were so closely linked that the Commission could not eliminate consideration of McCollum's guilt or innocence when it examined Brown's claim.⁵⁵¹

Near the end of questioning of witness Stellato, District Attorney Johnson Britt asked her whether there was any evidence developed during the course of the Commission's investigation that linked Brown or McCollum to the murder and rape of Buie. Stellato responded that the Commission could not "substantiate any evidence linking them to the crime."⁵⁵²

5. Judge's Decision

In his closing statement to the court, Britt joined the defense in asking the court to vacate the convictions of Brown and McCollum. He placed emphasis on the DNA evidence that identified Artis as either a participant in, or perpetrator of, the rape and murder of Buie. He also noted that this DNA evidence excluded McCollum and Brown. He stated that he believed the evidence presented at the hearing negated the proof introduced at trial and the result would now be different. Also, if a new trial were granted, the State would not have a case, and he would not re-prosecute Brown and McCollum.⁵⁵³

Superior Court Judge Douglas Sasser ruled that the interest of justice compelled the court to "vacate the conviction and death sentence of Mr. McCollum and the conviction and life sentence of Mr. Brown and discharge both men from confinement based on significant new evidence that they are, in fact, innocent."⁵⁵⁴ Nine months later, on June 4, 2015, Governor Pat McCrory granted "pardons of innocence" to Brown and McCollum.⁵⁵⁵

550. *Id.* at 116. Stellato noted that even though his client did not file a claim, McCollum's attorney had been cooperative with the Commission. *Id.*

551. *Id.* at 116–17.

552. *Id.* at 115.

553. *Id.* at 122, 124. Britt referred only to the identification of a "third party" as the perpetrator, *id.* at 122, but he obviously meant Artis. Britt noted that under the state's DNA statute, N.C. GEN. STAT. § 15A-270 (2015), the defendants would at a minimum be entitled to a new trial, Motion for Appropriate Relief Transcript, *supra* note 491, at 121–22.

McCollum's attorney, Ken Rose, praised "the amazing work of the Innocence Inquiry Commission." Motion for Appropriate Relief Transcript, *supra* note 491, at 125.

554. Motion for Appropriate Relief Transcript, *supra* note 491, at 130.

555. See Craig Jarvis, *Gov. Pat McCrory Pardons Two Half-Brothers Imprisoned for Decades*, NEWS & OBSERVER (June 4, 2015, 12:34 PM), <http://www.newsobserver.com>

F. *The Joseph Sledge Case*

This case involved an extraordinarily unfortunate coincidence—Joseph Sledge escaped from prison and only a few miles away two women were brutally murdered in the hours after his escape. This made him “an obvious suspect.”⁵⁵⁶ Without another clear suspect, the law enforcement investigation continued to focus on him.⁵⁵⁷ Those two aspects of the case are perhaps unavoidable, but much of the rest is not.

The case demonstrated classic criminal investigation errors resulting from bad forensic evidence and jailhouse informant testimony. Microscopic hair comparison connected Sledge to pubic hairs found on one victim’s body, but when tested regarding mitochondrial DNA, these and all other hairs recovered from her body were shown to have been left there by someone else. Additionally, serology results from preliminary tests, which were never confirmed, suggested to the jury that the car Sledge drove hours after his escape was liberally splattered with blood.⁵⁵⁸ Two aspects of the jailhouse informant testimony in the *Sledge* case were particularly troubling. First, investigators gave this obviously suspect evidence the primary role in building a successful prosecution when the investigation went cold. Second, those investigators gave one of the informants an opportunity to modify his story about a long-past encounter with Sledge over a series of interviews as it became more and more incriminating, and the prosecution presented only the final version to the jury.

The crime involved was a very brutal double murder of two elderly women in their home in a small community in rural eastern

/news/politics-government/article23091657.html [https://perma.cc/9LCR-YVHC?type=image] (noting also that the pardon makes the men eligible for \$750,000 in compensation). This pardon is noted because a judge at an MAR hearing, unlike the three-judge panels, has no official status to make a finding of innocence. *See id.*

556. *See An Obvious Suspect*, WRAL (June 23, 2015), <http://www.wral.com/wral-documentary-an-obvious-suspect-to-air-june-23/14681386/> [https://perma.cc/HV8J-EYKJ].

557. Detective Little said they were never able to eliminate him as a suspect. *See* Transcript of Hearing at 45–46, *State v. Sledge*, 78-CRS-2415 (N.C. Innocence Inquiry Comm’n Dec. 3, 2016) [hereinafter *Sledge Hearing Transcript*], <http://www.innocencecommission-nc.gov/sledge.html> [https://perma.cc/PXP9-5CRY]. This is made clear by “[a]n SBI status report covering September 23, 1977 through October 12, 1977 [stating], ‘Presently the investigation is centered around SLEDGE in an attempt to either eliminate him or take whatever action is necessary against him.’” N.C. Innocence Inquiry Comm’n Brief at 41, *State v. Sledge*, 78-CRS-2415 (N.C. Innocence Inquiry Comm’n Dec. 3, 2014) [hereinafter *Sledge Brief*], <http://www.innocencecommission-nc.gov/Forms/pdf/Sledge/State%20v.%20Joseph%20Sledge%20Brief.pdf> [https://perma.cc/HVG5-FZW2].

558. *Sledge Brief*, *supra* note 557, at 201 (showing State’s Exhibit 23, a schematic diagram of the car and the areas of suspected blood).

North Carolina that cried out for resolution.⁵⁵⁹ Joseph Sledge was an escapee from prison, and the jury heard that he expressed the radically anti-white views of a Black Muslim. The case is rich in factual detail. The Commission process played a substantial but often subtle role in Sledge's exoneration. This case demonstrated the importance of the Commission's ability, not only to have access to evidence from law enforcement and the prosecution, but also to conduct its own searches for evidence. Finally, its credibility and neutrality in marshalling and presenting evidence was important in persuading reluctant authorities to accept the unsettling conclusion that an earlier investigation and adjudication of a brutal murder reached the wrong result.

1. The Crime

Josephine Davis, who was seventy-four, and her fifty-three-year-old daughter, Aileen Davis, were found dead in the home they shared outside Elizabethtown, North Carolina in Bladen County on Monday, September 6, 1976, Labor Day.⁵⁶⁰ They had been brutally beaten and stabbed multiple times, and Aileen had been sexually assaulted.⁵⁶¹ The two women were last seen by family members on the night of Sunday, September 5 at about 10:30 p.m.⁵⁶² They were found at about 4:00 p.m. on Monday afternoon when a family member tried to open the front door but found it blocked by Aileen's body.⁵⁶³

Led by Detective Phillip Little, who was the first person to enter the house, investigators with the Bladen County Sheriff's Office examined the crime scene for evidence the day the bodies were found.⁵⁶⁴ They were later joined by SBI investigators and on multiple subsequent occasions evidence was gathered from the victim's

559. *See id.* at 3.

560. *Id.* at 111.

561. *Id.* at 17, 28.

562. *Id.* at 23.

563. *Id.* at 111 (testimony of Wanda Hales, Josephine Davis' granddaughter and Aileen Davis' niece, at second trial). The SBI report gave the time as "approximately 4:30 [p.m.]" *Id.* at 23 (Agent Evans' SBI report). The Bladen County Medical Examiner, who examined the bodies at the crime scene, estimated the time of death was eight to ten hours before the time of his examination at 6:00 p.m. on September 7, 1976, *id.* at 30, but the pathologist who performed the autopsies the next day stated that he could not give a time of death. *Id.* at 28.

564. *Id.* at 28–29 (Evans' SBI report). Little said he was the first person in the house at 5:15 p.m. on September 7, 1976, and that the body of Aileen was so close to the door that it would not open all the way. *Id.*

home.⁵⁶⁵ Both bodies were found in the front room of the house, which contained two couches on which the women slept, two refrigerators, and other furniture.⁵⁶⁶ Large amounts of blood were observed on the victims and the floor around them, the two refrigerators, the wall, and the front door near the bodies.⁵⁶⁷ Latent prints were lifted, the victims' clothing was secured, and apparently foreign hairs were recovered from one of the victims' body.

Autopsies performed on the bodies showed that both victims suffered multiple stab wounds to the face and neck, which resulted in hemorrhages that caused death. The face and head of both women were bruised; both sides of Josephine's face were fractured; and the entrance to Aileen's vagina was lacerated.⁵⁶⁸

Sledge was immediately a suspect because he had escaped from White Lake Prison Camp, which was four miles from the Davis home, the day before the murder. Law enforcement was informed that prison personnel, using dogs, had tracked Sledge in the direction of the victims' residence before the dogs lost his scent. His line of travel to nearby Elizabethtown, where he stole clothing and a car, would have taken him near the Davis house.⁵⁶⁹ An escape from the White Lake prison facility was not a great feat due to its minimal security,⁵⁷⁰ with roughly fifteen inmates escaping from June through September.⁵⁷¹ Unfortunately for Sledge, he escaped shortly before the murders.

The next day, a police officer in Fayetteville, North Carolina spotted Sledge in the car he had stolen in Elizabethtown and gave

565. *Id.* at 74. *See, e.g., id.* at 24–25 (documenting visits on September 6; October 7, 11, and 26, 1976); *id.* at 34 (showing that a section of floor with bloody footprint was removed on Sept. 30, 1976); *id.* at 41 (Evans' SBI report) (Sept. 29, 1977).

566. *Id.* at 10, 12 (Detective Little's sketches of the Davis house).

567. *Id.* at 29–30, 33 (Evans' SBI report).

568. *Id.* at 17. Both bodies were exhumed and a second autopsy was performed on both women to get fingerprints and palm prints, x-rays, and determine the angle and depth of the wounds. *Id.*

569. Sledge Hearing Transcript, *supra* note 557, at 18–19 (testimony of Little). Little testified that Sledge was tracked to a bridge and if one followed the road from that point toward Elizabethtown, the route would go within 300 yards of the Davis residence. *Id.* at 24–26. At the second trial, Little testified that the car was stolen about a mile from the Davis residence and the clothes were stolen from a clothesline “about a city block away”. Sledge Brief, *supra* note 557, at 114.

570. *See* Sledge Hearing Transcript, *supra* note 557, at 596–97 (describing the prison fence as “easy” to get over and lacking guards to patrol it).

571. Prison Superintendent Sparkman gave those figures in newspaper articles. *Id.* at 220. Little testified that he knew of no other inmates who had escaped at the same time. *Id.* at 101–02.

chase, but after crashing the car, Sledge escaped on foot.⁵⁷² He was arrested two days later in Dillon, South Carolina and returned to North Carolina.⁵⁷³

On September 12, 1976,⁵⁷⁴ Little and other law enforcement officers drove Sledge around the area. Sledge showed them his route, which differed from how prison authorities believed he traveled, but still took him only a few hundred yards from the Davis home.⁵⁷⁵ He also showed them where he had stolen clothes and hidden some of the clothing he had been wearing.⁵⁷⁶ Little testified that they also drove Sledge to the victims' house and parked:

[Sledge] looked over at the Davis house. He was handcuffed with his hands in front of him. He lifted his hands and pointed to the Davis house and said, "A black man did not kill those two women. A white man did it. A black man would not have cut them up like they were."⁵⁷⁷

2. Forensic Evidence Developed for Sledge Trials

a. *Fingerprint and Palm Print Evidence*

A total of ninety-seven latent fingerprint and palm print lifts were collected from the crime scene. The reports did not set out how many of these were of sufficient value that they could be compared with known prints, but indicated that thirteen prints were identified as belonging to the victims and two to a female relative.⁵⁷⁸ The prints were compared to Sledge's prints, and no identification was made.⁵⁷⁹

572. Sledge Brief, *supra* note 557, at 180 (testimony by Fayetteville Police Officer G.D. White at second trial).

573. *Id.* at 17.

574. *Id.* at 123. At the first trial, Little testified this trip took place on September 10, 1976. *Id.* at 18 n.9.

575. Sledge Brief, *supra* note 557, at 252–58. Little placed the house three tenths of a mile from U.S. Highway 701 (Evans' SBI report, which is the route Sledge stated he traveled. *Id.* at 252–58 (testimony of Sledge at second trial). Stellato said the route described by Sledge and where the dogs tracked him were parallel courses to Elizabethtown. Sledge Hearing Transcript, *supra* note 557, at 218. Both paths would have taken him near the victims' house, and indeed the route Sledge said he traveled would have taken him slightly closer. *Id.* at 219. In his testimony before the Commission, Sledge guessed he must have come within a fourth of a mile of the house. *Id.* at 599.

576. Sledge Brief, *supra* note 557, at 18.

577. *Id.* at 129 (testimony of Little at second trial that he said nothing to Sledge at this time about the house being that of the victims).

578. *Id.* at 74.

579. *Id.* at 75. One of the prints was a bloody handprint on the wall near the front door. *Id.* at 77, 79 (crime scene memo, diagram).

b. Testing for Semen and Blood

Numerous items were tested for semen and blood. No semen was found on the vaginal swabs taken from Aileen Davis' body or any other item.⁵⁸⁰ The car Sledge stole from Elizabethtown gave positive indications using preliminary tests for blood.⁵⁸¹ Whether the areas tested, which revealed only trace amounts, were the result of wiping up wet blood or were transfers from heavy dry stains, the stains remaining could not be determined because they could not be tested adequately.⁵⁸² Indeed, whether the substance was human blood at all was not determined since the tests were only preliminary, inconclusive tests.⁵⁸³

c. Microscopic Hair Comparison

Little collected a number of hairs from Aileen Davis' body, four of which were removed from her abdominal area, with another imbedded in blood on her forehead.⁵⁸⁴ Microscopic examination revealed one pubic hair "of Negroid origin" and "[f]our head hairs of Negroid origin."⁵⁸⁵ Pubic hair samples were taken from Sledge for comparison, but head hair could not be collected because his head "was almost in a shaven position." The investigation showed this style was how he wore his hair at the time of the crime. The hair comparison was conducted by an FBI analyst who found that a pubic hair recovered from the victim's abdominal area was "microscopically like" Sledge's pubic hair sample.⁵⁸⁶

3. Concluding an Investigation that had Gone Cold

On September 12, 1977, as the investigation moved into its second year, SBI Agent Henry Poole was assigned to assist with the languishing investigation. A SBI status report covering September 23, 1977, through October 12, 1977, states, "[p]resently the investigation is centered around SLEDGE in an attempt to either eliminate him or take whatever action is necessary against him."⁵⁸⁷

580. *Id.* at 80.

581. *Id.* These tests were conducted with luminol and benzidine. *Id.* at 95, 189.

582. *Id.* at 95.

583. *Id.* at 196 (cross-examination of SBI Agent Joseph Taub at second trial).

584. *Id.* at 96, 113.

585. Sledge Hearing Transcript, *supra* note 557, at 472-73.

586. *Id.* (quoting trial transcript).

587. *Id.* at 41 (quoting SBI Status Report, Oct. 12, 1977).

4. Jailhouse Informant Testimony

In September 1977, investigators began interviewing inmates who had been in custody with Sledge after he was returned to North Carolina after his capture. The Commission catalogued interviews with numerous prisoners and Captain Sparkman, the Superintendent of the White Lake Prison Camp, in September, October, and early November 1977. None of these inmates said Sledge implicated himself in the murders, but they did say he made statements about hating white people and killing all white women as a way to do away with white men, who were devils.⁵⁸⁸

Poole and Little conducted the first of four interviews of Donald Sutton, who was in the Sampson County Prison Unit, on November 4, 1977.⁵⁸⁹ More than a year earlier in September 1976, Sutton had been confined at the Cumberland County Jail during the brief period Sledge was held there after his capture in South Carolina. In that first interview, Sutton told the investigators that Sledge said the authorities were trying to pin the crime on him, but he did not do it.⁵⁹⁰ The report then states: “Sutton said he would try to recall his conversations with SLEDGE and should he be able to remember any new information, he would relay same to writer. Agent’s Note: Sutton will be interviewed at a later date.”⁵⁹¹

On February 8, 1978, Sutton was interviewed for a second time. Sutton now said Sledge told him that the women in Bladen County were supposed to die and that Sledge was glad about their death. Sledge said he hated white women, who were “she devils” and should die. Sledge also said something about a lot of blood, but Sutton didn’t recall exactly what he said. The report of the interview concluded with an “Agent’s Note”: “Sutton stated that since it has been sometime since he had talked with SLEDGE, he would need time to

588. *Id.* at 55–56. Over the course of later conversations, one of these inmates, Julian Broadway, reported that “Sledge said he had to cut two white women’s throats in Bladen County” and disposed of the knife and clothes. Sledge Brief, *supra* note 557, at 57. Another inmate said that Sledge spoke of “she devils” and getting rid of “she devils.” *Id.* at 57–58 (describing December 28, 1977, interview with Robert Washington).

During his testimony before the Commission, Little said several inmates and acquaintances told investigators that Sledge was a devout Muslim who hated white women and white people. Sledge Hearing Transcript, *supra* note 557, at 86.

589. Sledge Brief, *supra* note 557, at 56. As described later, Sutton testified for the prosecution in Sledge’s trials and received \$2,000 for his information and testimony after Sledge was convicted. *Id.* at 56, 70.

590. *Id.* at 56.

591. *Id.* (quoting from SBI Status report, Nov. 14, 1977).

think and put the conversation together. This interview was terminated.”⁵⁹²

Two days later on February 10, 1978, Poole and Little again interviewed Sutton. In this third interview, Sutton repeated Sledge’s statement that authorities were trying to say that he killed the two women and he tried to leave North Carolina because “they” were going to convict him of killing the two women. “SLEDGE said he wasn’t guilty but after more conversation, SLEDGE said, ‘They should be dead.’ . . . SLEDGE said something about a lot of blood and seemed to be ‘hung up on blood.’ ”⁵⁹³ The report again contained an “Agent’s Note”: “Sutton stated he needed to think about their conversation and would probably be able to recall more of what he and SLEDGE talked about. This interview was terminated, and Sutton will be reinterviewed at a later time.”⁵⁹⁴

The fourth and final interview was five days later on February 15, 1978. According to Poole’s report of this interview, Sutton said: “[H]e asked Sledge about the murder and Sledge said that he didn’t intend to kill them, but was put in a position where he had to do it. Further that Sledge said he was ‘glad the bitches were dead.’ Sutton went on to say that Sledge talked about ‘all that blood’ That he (Sledge) said something about the women being cut up.”⁵⁹⁵

The day following Sutton’s final interview, February 16, 1978, Poole and Little along with Captain Sparkman of the White Lake prison unit interviewed another inmate, Herman Lee Baker, at the Bladen County Sheriff’s Office. Baker told them that he had a conversation with Sledge in June or July 1977 at the Moore County Prison Camp. After asking Baker whether he could keep a secret, Sledge told him that during his escape he looked for a place to hide and came upon an old house that he thought was unoccupied. After he entered the house, a lady came in the room screaming, “What are you doing in the house?” He pushed her and hit her, and another lady came in the room yelling to call the police. Sledge said he kept stabbing and stabbing them. He also referred to the women as devils and thought that when he stabbed them fire would come out rather than blood. He said he ran out of the house through the back door. Sledge said he sprinkled black pepper around the back door steps when he left the house to keep the devils’ spirits from coming after him. He ran to a cleared field where there was an old building and

592. *Id.* at 58–59 (quoting SBI Investigative Report, Jan. 5, 1977).

593. *Id.* at 59 (quoting SBI Investigative Report, Jan. 5, 1977).

594. *Id.* at 59–60 (quoting SBI Investigative Report, Jan. 5, 1977).

595. *Id.* at 61–62 (reproducing the full interview report).

buried the knife behind the building.⁵⁹⁶ After receiving this statement, Little returned to the Davis house and recovered a can of black pepper, which he said he had seen lying on the floor in the hall that led to the rear exit when he first inspected the crime scene.⁵⁹⁷

5. Sledge Statement to Detectives

Notes from only one interview of Sledge by detectives—an interview with Little and Poole on January 18, 1978—were located in law enforcement files.⁵⁹⁸ In this interview, Sledge waived his Miranda rights and denied any involvement in the murders.⁵⁹⁹

6. Trials

Sledge was tried twice on first-degree murder charges.⁶⁰⁰ The first trial, held on May 1–4, 1978, ended in a mistrial because the jury could not reach a verdict.⁶⁰¹

The second trial was held August 28–31, 1978.⁶⁰² The State introduced testimony by Detective Little regarding Sledge’s statement in front of the victims’ house that a white man rather than a black man had done the crime because of how badly the victims were cut up. The State also introduced the microscopic hair comparison evidence from a pubic hair on Aileen’s abdominal area, which showed that hair and Sledge’s pubic hair to be microscopically alike. The jury was told this meant the hair on the victim’s body “could have originated from him or another individual of the same race whose hairs exhibited the same exact microscopic characteristics.”⁶⁰³ SBI Special Agent Joseph S. Taub testified to finding evidence of blood in the car Sledge stole in Elizabethtown and abandoned in Fayetteville, which illustrated its various locations around the interior of the car.⁶⁰⁴ The owner of the car testified that she knew of no blood in it before

596. *Id.* at 63–65 (full report of statement by Poole).

597. *Id.* at 227, 234 (testimony of Little at the second trial). In Little’s detailed description of the house crime scene, he made no note of the pepper can or any indication that pepper was observed near the rear door of the house. *Id.* at 28–35.

598. *Id.* at 66, 68–69 (report written by Poole).

599. *Id.* at 67–69.

600. *Id.* at 98, 111. As the result of a change of venue, he was tried in Columbus County rather than Bladen County. *Id.*

601. *Id.* at 98.

602. *Id.* at 111.

603. *Id.* at 177 (quoting trial testimony of FBI Special Agent James Frier).

604. *Id.* at 188–93, 201 (testimony of Special Agent Taub at second trial and Exhibit 23) (describing multiple locations in the car that tested positive for blood by luminol and benzidine and presenting a diagram of the locations).

the theft.⁶⁰⁵ Sledge's defense attorney elicited the fingerprint evidence during cross-examination of Little. When asked whether "all those fingerprints were negative to defendant Sledge," Little responded, "as far as I know."⁶⁰⁶

Sutton and Baker testified at both trials. In his testimony, Sutton basically recounted what he told investigators in his final statement. In corroboration of Sutton, Little described the substance of that fourth interview.⁶⁰⁷ He acknowledged that he and Poole talked with Sutton other times, but claimed that Sutton said "basically the same thing."⁶⁰⁸ In his testimony at trial, Baker added to the statement he gave to Poole and Little that Sledge had told him he hit one of the ladies in the jaw.⁶⁰⁹

Sledge testified in his own defense. When asked about the statement Little said he had made in front of the victims' house, Sledge testified that what he had said was that a white person from the victims' family committed the murder, which he had heard from an inmate who had heard it from a police officer.⁶¹⁰

At the conclusion of the second trial, the jury returned a verdict of guilty as to two counts of second-degree murder, and Sledge was sentenced to life imprisonment on each conviction with the sentences running consecutively.⁶¹¹ On November 30, 1978, Baker received \$3,000 and Sutton received \$2,000 for information and testimony that led to Sledge's conviction.⁶¹²

7. Post-Conviction Investigation and Proceedings

Over the years, Sledge filed more than twenty *pro se* motions challenging his conviction and asserting his innocence.⁶¹³ In June 2003, a superior court judge granted Sledge's *pro se* motion for DNA

605. *Id.* at 177 (summarizing testimony of Hazel Thompson Smith). On cross-examination, Ms. Smith acknowledged that when the car was returned, she was also not able to see any blood in the car. *Id.* at 178.

606. *Id.* at 146. Little also testified that a plaster cast of shoe tracks outside the home and the bloody shoeprint inside were inconsistent with the shoes Sledge was wearing when apprehended. *Id.* at 147.

607. *Id.* at 173 (summarizing Little's testimony).

608. *Id.* (quoting trial transcript).

609. *Id.* at 207–08. After the second autopsy, where x-rays were taken, it was determined that Josephine Davis had fractures to both sides of her jaw bone. *Id.* at 17.

610. *Id.* at 297 (testimony of Sledge at second trial).

611. *Id.* at 307–08.

612. *Id.* at 70.

613. See Mandy Locke, *In Prison for 34 Years, but 'God Knows I'm Innocent'*, NEWS & OBSERVER (Mar. 16, 2013), <http://www.newsobserver.com/news/local/crime/article10345667.html> [<https://perma.cc/7TPT-KY3U>].

testing. However, it was not until 2008, five years later and with the help of his attorney, Christine Mumma, that the physical evidence that had been located was submitted to the SBI for testing.⁶¹⁴ In 2009, the SBI issued reports stating that it found no DNA profile on the black pepper box, found a partial male DNA profile from Aileen Davis' slip that did not match Sledge's profile, and found a second partial male DNA profile on Josephine Davis' dress that also did not match Sledge or the profile obtained from Aileen Davis' slip. In 2010, Sledge's attorney and the district attorney entered into a consent order for additional DNA testing at LabCorp, a private laboratory. A partial male DNA profile was developed from Josephine Davis' slip, and Sledge was excluded as the source.⁶¹⁵

However, at this point no testing had been conducted on the foreign hairs found on Aileen Davis' body, including a number of hairs recovered from her abdominal area,⁶¹⁶ because that evidence could not be located.⁶¹⁷ In August 2012, the Columbus County Clerk climbed a ladder and located the missing hair evidence in an envelope on top of an upper shelf in the evidence vault.⁶¹⁸ Later that year, the hairs were sent to LabCorp, but it could not obtain a profile from the two hairs tested. The hairs were then sent to Mitotyping Technologies, another private lab, for more specialized testing. On December 13, 2012, that laboratory reported that the two hairs shared "a common base at all positions" indicating they "could have come from the same person or maternally related persons."⁶¹⁹ The profiles of the two hairs differed from Sledge's mitochondrial DNA profile, meaning that Sledge was excluded as their source.⁶²⁰

In February 2013, District Attorney Jon David requested SBI assistance investigating the murders of Josephine and Aileen Davis. On March 18, 2013, Mumma interviewed Baker, one of the jailhouse informants. The next day, Mumma re-interviewed Baker and obtained an affidavit from him recanting his incriminating testimony against Sledge. In March 2013, she filed a motion for post-conviction relief for Sledge.⁶²¹ In May 2013, she referred the case to the Commission, and subsequently filed a motion to hold the court

614. *Id.* See Sledge Brief, *supra* note 557, at 320.

615. Sledge Brief, *supra* note 557, at 321.

616. See *supra* text accompanying notes 584–586.

617. See Locke, *supra* note 613.

618. See *id.*; see also Sledge Brief, *supra* note 557, at 321.

619. Sledge Brief, *supra* note 557, at 321.

620. *Id.*

621. *Id.* at 322.

proceeding on the post-conviction motion in abeyance.⁶²² Despite initial opposition from District Attorney David, the court granted a limited delay, and this delay was ultimately extended to cover the duration of the Commission's investigation.⁶²³

8. Commission Evidence Recovery

When the Commission received the *Sledge* case, a number of items of evidence were missing. The hairs had been located, but much of the evidence tested from 2008 to 2010 had been lost after being returned from LabCorp. The SBI file of latent fingerprint lifts had also been lost.⁶²⁴ In terms of law enforcement records, the Commission only had the SBI investigative file⁶²⁵ and a portion of the SBI lab file.⁶²⁶ In addition to much of the physical evidence, the trial transcript from the first trial, the district attorney's file, and the Bladen County Sheriff's Office file were also missing.⁶²⁷

The court file, including some photographs introduced at trial, but no physical evidence, was provided when the Commission contacted the Columbus County Clerk's Office, where the trials were conducted after a change in venue.⁶²⁸ The prosecutor's file was never located.⁶²⁹

When Commission investigators contacted the Bladen County Sheriff's Office regarding missing files and physical evidence, the office responded that it had been unable to locate any of these materials, even the items tested and returned in 2010. Commission investigators were told that evidence not admitted at trial had been

622. *Id.*

623. *Id.*

624. *Sledge* Hearing Transcript, *supra* note 557, at 330. When contacted by Commission investigators about the fingerprint file, the crime lab was unable to locate it and suggested it may have been "destroyed in 2007 along with other files from the mid-1970s." *Id.* at 338-39. However, the crime lab could not produce documentation of the destruction. *Id.*

625. The Herman Baker interview and some of the Donald Sutton interviews were missing from the SBI file. Commission investigators later located these interviews in files from the Bladen County Sheriff's Office. *Id.* at 339.

626. *Id.* at 330, 339.

627. *Id.* at 330. When the Commission began its investigation it had a copy of the transcript of the second trial, but not the initial trial. *Id.* A search by Commission investigators of the Columbus County District Attorney's office located the missing first trial transcript. *Id.* at 335.

628. *Id.* at 332.

629. *Id.* at 336. The Commission's investigative efforts included contacts with the district attorney during the original trials and a search, in particular, of the Brunswick County office where he had his main office. A search by Commission investigators of the Columbus County office located the missing first trial transcript. *Id.* at 335.

destroyed years ago, but the sheriff's office had no documentation of the destruction.⁶³⁰ The Commission was also told that both the sheriff's office staff and the SBI had conducted searches but had not located anything.⁶³¹ The Commission investigators nevertheless asked for permission to conduct their own search, and the sheriff agreed.⁶³²

The Commission investigators conducted a four-day search of multiple locations where evidence was stored, discovering new storage locations as they proceeded.⁶³³ During the search of the secure sheriff's office gun vault, the investigators found inside padlocked lockers two packages with Sledge's name on them. One of them contained the ninety-seven latent print lifts from the crime scene.⁶³⁴ The investigators also searched eight large steel storage containers, and inside one, they found a box with a FedEx label from LabCorp that contained the missing dresses, slips, and pepper can returned by LabCorp to the sheriff's department in 2010.⁶³⁵ As authorized by statute, Commission investigators took possession of the physical evidence they found,⁶³⁶ and it was later sent to experts for additional testing.

9. Commission Hearing

The Commission held a hearing on the *Sledge* case on December 3–5, 2014. The case presented at trial against Sledge rested on his escape from a nearby prison shortly before the murder, his ambiguous but arguably incriminating statement made a few days later when he was driven to the crime scene, the jailhouse informant testimony, the

630. *Id.* at 341–42 (obtaining information from Lieutenant Jeff Singletary, who had been with the office for twenty-two years).

631. *Id.* at 342.

632. *Id.* One set of materials turned up as the sheriff's department began moving files in a storage facility in anticipation of the Commission's search. A box marked with the name of Phillip Little was located and the original investigative files were found inside it. *Id.* at 343. Whether these are complete or incomplete files is not known. *Id.* at 343–44.

633. *Id.* at 344. The Commission investigators who conducted this search, Stellato and Smith, are both trained in the handling of evidence and are certified evidence custodians. *Id.* at 347.

634. *Id.* at 345. It also contained a piece of linoleum cut from the floor of the victims' house, and a white paper bag. *Id.* at 345–46. These items had been returned from the SBI Crime Lab in 2007 according to documentation inside the envelope. However, as noted earlier, the crime lab did not have documentation of the return. *Id.* at 346. On top of a set of lockers, investigators found a box labeled "Phillip Little drug cases" and a small file of Sledge materials was inside. *Id.* at 345. This file contained only post-conviction letters and documents related to the *Sledge* case. *Id.*

635. *Id.* at 346–47.

636. *See, e.g., id.* at 347–48 (taking possession of victims' dresses and slips and the pepper can). *See* N.C. GEN. STAT. § 15A-1467(d) (2015).

hair comparison evidence, and the preliminary tests showing blood inside the car that Sledge stole in Elizabethtown the night of the murders.⁶³⁷

a. Informant Testimony

Donald Sutton, the informant who testified that Sledge had admitted guilt in the murders while confined with him in September 1976 in the Cumberland County Jail, died in 1991, long before the inquiry began.⁶³⁸ Commission handouts showed extensive press coverage in local and area papers, which provided a ready source of basic information about the crimes.⁶³⁹ The four statements contained in investigator materials showed changes over time, moving from an initial statement that Sledge denied guilt to an admission he committed the murders. Little and Poole gave Sutton time to remember more about the conversation with Sledge in September 1976, which had occurred the year before even his first interview. Little and Poole were asked whether giving an informant additional time in which he could potentially gather more information to augment earlier statements concerned them. Little acknowledged some concern but contended that, except for the first statement, the remaining three statements were largely consistent.⁶⁴⁰ Poole said he had no such concern.⁶⁴¹ The earlier statements were not made available to defense counsel at Sledge's trials.⁶⁴²

Herman Baker, the other jailhouse informant, was available and testified at the Commission hearing. Before they heard Baker's

637. Mike Easley, who was lead prosecutor at the second trial (and later became Governor), told investigators from the Center on Actual Innocence that he felt that the most powerful evidence in the case was the informant testimony. Sledge Hearing Transcript, *supra* note 557, at 284; Sledge Brief, *supra* note 557, at 111.

638. See Transcript of Three-Judge Panel Hearing at 103–04, State v. Sledge, 78-CRS-2415, 78-CRS-2416 (N.C. Super. Ct. Jan. 23, 2015) [hereinafter Sledge Three-Judge Panel Transcript], <http://www.innocencecommission-nc.gov/Forms/pdf/Sledge/three-judge-panel-hearing-transcript-state-v-sledge.pdf> [https://perma.cc/P526-VWK6].

639. See generally Innocence Inquiry Comm'n Hearing Handouts, State v. Sledge, 78-CRS-2415, 78-CRS-2416 (N.C. Super. Ct. Dec. 5, 2014) [hereinafter Sledge Comm'n Handouts], <http://www.innocencecommission-nc.gov/Forms/pdf/Sledge/Handouts%20provided%20to%20the%20Commission%20during%20the%20hearing.pdf> [https://perma.cc/2SJJ-7BGS] (showing crime information in newspapers from Bladen County and the nearby city of Fayetteville in Cumberland County).

640. Sledge Hearing Transcript, *supra* note 557, at 62. Little stated the change in Sutton's story between his first statement and his final version did bother him. *Id.* at 55.

641. *Id.* at 130.

642. Affidavit of Reuben L. Moore at ¶ 6, State v. Sledge, 78-CRS-2415, 78-CRS-2416 (N.C. Super. Ct. Oct. 24, 2014), <http://www.innocencecommission-nc.gov/Forms/pdf/Sledge/Handouts%20provided%20to%20the%20Commission%20during%20the%20hearing.pdf> [https://perma.cc/2SJJ-7BGS].

testimony, the commissioners were told of prior interviews of Baker conducted by Sledge's lawyer, Christine Mumma,⁶⁴³ SBI Special Agent Chad Barefoot,⁶⁴⁴ and Commission Investigator Sharon Stellato.⁶⁴⁵ Although Baker's prior statements were at times

643. Sledge Hearing Transcript, *supra* note 557, at 158–64, 186. Mumma testified that after learning from District Attorney David in February 2013 that he considered the informant testimony important, she began efforts to find Baker in Fayetteville. After a meeting with the SBI in Fayetteville on March 18, 2013, Mumma found Baker walking along a street. *Id.* at 163–64. She had interviewed him in September 2011, *id.* at 158–59, and when Mumma approached Baker, he recognized her, *id.* at 165. She told him that she was still working on Sledge's case and now had physical evidence that did not match him. Baker interrupted her to say that when he was in jail, "they fed me everything. They told me some shit about a pepper can." *Id.* Baker told her that he was not offered help on his sentence, only offered a reward. *Id.* at 164–65. Mumma called SBI Agent Chad Barefoot, and gave him Sutton's location. He arrived about fifty minutes later. *Id.* at 167–68.

The next day, Mumma again interviewed Baker, this time recording the interview. *Id.* at 170; *see also* Sledge Comm'n Handouts, *supra* note 639 (transcript of recorded Chris Mumma interview with Herman Baker). Mumma said she decided to re-interview Baker quickly when Barefoot told her after his conversation with Baker that he would not conduct a formal interview until a week later. Mumma feared Baker might leave town and be difficult to find again. When she told Barefoot of her concern and that she would interview Baker the next day, Barefoot asked her to record the interview. Sledge Hearing Transcript, *supra* note 557, at 170. In this conversation, Baker confirmed that Sledge never said that he committed the murders. Sledge Comm'n Handouts, *supra* note 639 (transcript of recorded Chris Mumma Interview with Herman Baker). Baker also told Mumma that the pepper can was first mentioned to him by Sparkman while Baker was in prison. *Id.* at 4. Mumma had prepared an affidavit for Baker to sign based on their conversation the previous day. Baker asked that several additions be made in the affidavit, and he initialed the changes and signed the affidavit. *See id.*; Affidavit of Herman Lee Baker, Jr., State v. Sledge, 78-CRS-2415, 78-CRS-2416 (N.C. Super. Ct. Mar. 19, 2013), <http://www.innocencecommission-nc.gov/Forms/pdf/Sledge/Handouts%20provided%20to%20the%20Commission%20during%20the%20hearing.pdf> [<https://perma.cc/2SJJ-7BGS>].

644. Sledge Hearing Transcript, *supra* note 557, at 185–87. Barefoot, who had been asked to assist District Attorney David on the Sledge investigation in February 2013, testified about having a brief conversation with Baker after Mumma had contacted Barefoot to let him know she had located Baker. Barefoot found Baker walking along the street in the area Mumma described. Barefoot stated that in his brief conversation with Baker, Baker said that while incarcerated together Sledge talked to him about white devils and black pepper, but that Sledge never told Baker that he had killed the women in Bladen County and did not make a confession. Sledge also said that Sparkman had told him about the reward in the case. *Id.* at 186, 190–93.

645. *Id.* at 220–21. Sharon Stellato interviewed Baker twice. The first interview was held on July 23, 2013, in Baker's lawyer's office and was recorded. *Id.* Baker said that he first learned of the murder from a guard who came to him while he was "in the hole." The guard said that since the guard knew that Baker knew Joe Sledge, the guard wanted Baker to testify about Sledge spreading black pepper to keep the she-devils away. *Id.* at 222–23, 229 (The conversation also contained some confusing comments about "a broken jar," which was actually meant to be in reference to the victim's broken jaw.).

In return for his testimony, the guard said Baker's charges would be dropped or Baker would get out early. The guards also took him to Sparkman. He was not told about a reward at that time. *Id.* at 224. Baker said he never heard Sledge call white women names and got the term "she-devils" from the guards. *Id.* at 225–26. He said that he and

inconsistent regarding whether some parts of his trial testimony was accurate, he firmly disavowed in each of his statements that Sledge had admitted that he killed the two women.

Under oath during the Commission hearing, Baker testified that he had talked to Sledge while in prison and that Sledge had neither confessed to any murders, nor talked about she-devils or white devils. He also testified that Sledge never talked about using black pepper.⁶⁴⁶ He told the Commission that his testimony at trial was what he had been told to say by a prison guard and the warden of the prison camp.⁶⁴⁷ He said he gave this testimony “[b]ecause I was in the hole for possession of marijuana and heroin . . . [a]nd . . . they’d give me a deal if I say . . . that Joe Sledge told it, told me that.”⁶⁴⁸ And those charges were dropped.⁶⁴⁹ Baker said that after he was released and living in Pennsylvania, the officers who came to drive him back to North Carolina for trial told him that he would receive a \$3,000 reward.⁶⁵⁰ When asked why he believed he was the one chosen to give this testimony, Baker said he didn’t know but supposed that it was

Sledge never talked about the murders. *Id.* at 227. When asked why he testified against Sledge, Baker said he thought what he was saying about Sledge committing the murders was true because of the way the guards were giving him the information. He continued to think it was true until he met with Christine Mumma who told him about the DNA evidence. *Id.* at 227–32.

Stellato interviewed Baker a second time after Commission investigators found a file containing the Baker interview. Stellato asked him whether Sledge confessed to a murder. Baker said he had talked to Sledge, but Sledge had not confessed to a murder. They had never talked about a murder at all. *Id.* at 238. He said Sledge did tell him about spreading black pepper to keep she-devils away, but Sledge never said that he put it down. *Id.* at 238. Later in the interview, Baker also said that he heard about fire coming out of she-devils. *Id.* at 240, 242. Baker said when he was in jail he was offered a deal by a prison guard and he was taken to Sparkman, who also provided him with information about the murders. *Id.* at 239. Baker said he thought his deal was good since he was facing five to ten years, and the charges were dropped. He made parole and went back to Philadelphia. *Id.* at 224. He said he was told by the two officers who came up to Philadelphia that he was going to split the reward with Donald Sutton. *Id.* at 241.

Stellato pointed out to Baker that he was saying different things in the two conversations she had with him. In the end, after talking with his attorney, Baker said the affidavit he signed with Mumma was correct with the corrections and that he didn’t know about the reward until after he testified and that he had not read the affidavit before he signed it. He said that Sledge had never confessed to a murder. He had talked about black pepper and she-devils or white devils, but not in relation to the murders. *Id.* at 242–45.

646. *Id.* at 259–60.

647. *Id.* at 261–63.

648. *Id.* at 263.

649. *Id.* at 266.

650. *Id.* at 265–66. Baker had been released on parole and was living in Pennsylvania at the time of the second trial. Sledge Brief, *supra* note 557, at 216–17 (testimony of Baker at second trial). In his testimony before the Commission, Baker only remembered there being one trial. Sledge Hearing Transcript, *supra* note 557, at 261.

because he was “in the hole in a bind [and] . . . [t]hey seen me talking to [Sledge] around the camp.”⁶⁵¹

b. Serology Evidence

At the Commission hearing, two points were made regarding the evidence suggesting that large amounts of blood were present in the car stolen by Sledge on the day of the murders. First, without a positive test for blood, rather than the preliminary test conducted, whether any blood was actually present was unknown.⁶⁵² Second, because the evidence was not preserved, no further testing was possible even as to whether the substance was blood.⁶⁵³

c. New Forensic Evidence from Fingerprint Comparison and DNA Testing

Marty Ludas, an expert in fingerprint comparison, testified and provided a very detailed analysis of the fingerprint evidence and his re-examination of it. He digitized, numbered, and catalogued all of the latent prints. He then determined which prints were of value for identification purposes and compared those with known prints. When possible, the source of the prints was identified. Ludas understood that the Commission was neutral regarding the outcome of his analysis.⁶⁵⁴ Accordingly, he compared all the prints to Sledge’s prints to make sure an identification hadn’t been missed, and reached the same result as the earlier examination—that Sledge’s prints could not be positively identified among any of the latent prints.⁶⁵⁵

A total of ninety-seven latent prints were evaluated, compared, and accounted for in some way.⁶⁵⁶ Ludas reviewed the positive identifications previously made of family members and agreed with those determinations.⁶⁵⁷ In addition to a print that is of value for a positive identification, Ludas noted that fingerprint analysis can exclude a person as the source of an unidentified latent print. Comparisons for exclusionary purposes had not previously been done in this case. Ludas conducted that re-examination, and he found fourteen prints that were excluded as originating with Sledge.⁶⁵⁸ He

651. *Id.* at 275.

652. *Id.* at 357 (noting the various tests); *id.* at 360, 365 (not known if actually blood).

653. *Id.* at 358.

654. *Id.* at 377.

655. *Id.* at 375–77.

656. *Id.* at 379.

657. *Id.* at 378–79.

658. *Id.* at 376–77. Photographs of the prints are available in the PowerPoint slides from the Commission hearing. *North Carolina Innocence Inquiry Commission Hearing:*

considered four unidentified prints to be particularly significant because they were located beside the body and the prints exhibited a ridge structure apparently made by blood.⁶⁵⁹ These prints had what he called a positive ridge structure, which means that the hand was in blood and subsequently touched an object as opposed to a negative ridge structure that results when the blood is already on the surface and the hand touches the blood. One of these positive prints was from a thumb beside a bloody palm print. The palm print was of no value, but Ludas was able to exclude Sledge as the source of the thumb print associated with it.⁶⁶⁰ He also excluded Sledge as the source of a second bloody palm print.⁶⁶¹ Ludas testified that he had a high level of confidence in the exclusions.⁶⁶²

Meghan Clement of Cellmark Forensics testified as an expert in DNA testing and technology.⁶⁶³ She described three different types of DNA technologies. The first is STR testing, which tests the DNA inherited from both parents. The second is Y-chromosome or Y-STR testing, which examines DNA found on the male Y chromosome and thereby basically ignores all female DNA by looking only at male DNA in the sample. The third type is mitochondrial DNA testing. This test reveals only DNA inherited from the mother, and thus all children of the same mother have the same mitochondrial sequence. This testing is particularly useful for hair without the root, which contains only mitochondrial DNA.⁶⁶⁴ Clement went through all the testing of the physical evidence that could be located by the Commission.⁶⁶⁵ In summary, this evidence included Aileen Davis' slip, Josephine Davis' dress and slip, the linoleum cut from the floor, and six fingerprint lifts that yielded male DNA. Sledge was excluded as a contributor of the male DNA on all of these items.⁶⁶⁶ The male DNA

State v. Sledge, N.C. INNOCENCE INQUIRY COMM'N (Dec. 3–5, 2014), <http://www.innocencecommission-nc.gov/sledge.html> [<https://perma.cc/LU5V-WJLF>] (Powerpoint Presentation used at Sledge Hearing). At another point in his testimony, Ludas indicated the number of exclusions was thirteen. Sledge Hearing Transcript, *supra* note 557, at 407–08.

659. Sledge Hearing Transcript, *supra* note 557, at 380–81, 383–84.

660. *Id.* at 380–83.

661. *Id.* at 383. Ludas was also able to exclude the two victims as the source of the palm print and fingerprint located in blood beside a body. *Id.* at 385–86.

662. *Id.* at 413.

663. *Id.* at 435–37.

664. *Id.* at 439–41.

665. *Id.* at 441–57. The Commission also prepared a chart detailing all of the tests done on these items. Sledge Comm'n Handouts, *supra* note 639 (North Carolina Innocence Inquiry Commission Forensic Testing Chart).

666. Sledge Hearing Transcript, *supra* note 557, at 441–57.

on Aileen's slip and the linoleum could have come from a common source.⁶⁶⁷

Terry Melton of Mitotyping Technologies also testified as an expert in DNA testing and technology.⁶⁶⁸ She testified about mitochondrial DNA testing done on the hairs for both the Center for Actual Innocence and for the Commission.⁶⁶⁹ When the Commission received the case, it had all hairs recovered from the victim's body tested. Mitotyping Technologies received nine hairs marked as recovered from a victim's body. All nine hairs had the same profile, meaning that either the same person left all nine hairs or they came from people with the same maternal lineage. The DNA testing excluded Sledge as the source of any of these hairs.⁶⁷⁰ Melton testified that these profiles are associated almost exclusively with people who have African maternal lineages.⁶⁷¹ Melton was also asked to comment on how microscopic hair comparison differs from DNA analysis. She noted that in one study the FBI found that 11% of its positive microscopic comparisons were found to be in error when the hairs were later subjected to DNA testing.⁶⁷²

d. Sledge Testimony

The Commission investigators found that Sledge always maintained his innocence.⁶⁷³ Sledge testified that he did not kill Josephine and Aileen Davis or in any way participate in the crime.⁶⁷⁴ He explained that he escaped because a violent offender with whom he had previously had a physical altercation had been transferred back to the White Lake unit.⁶⁷⁵ He described jumping the prison fence and waiting near the prison until after dark. He then traveled along U.S. Highway 701 to Elizabethtown. He acknowledged that his route took him near the victims' house, but said that he did not notice it.⁶⁷⁶

Sledge denied Detective Little's claim about the statement he allegedly made in front of the victims' home a few days after the

667. *Id.* at 450.

668. *Id.* at 460–61.

669. *Id.* at 464.

670. *Id.* at 465–66. Although the location of the hairs recovered could not be traced specifically to locations on the victim's body, some of these nine hairs, all of which did not belong to Sledge, were found in the victim's pubic area. *Id.* at 472–73; Sledge Brief, *supra* note 557, at 96.

671. Sledge Hearing Transcript, *supra* note 557, at 468.

672. *Id.* at 474–75.

673. *Id.* at 479–82.

674. *Id.* at 561–62.

675. *Id.* at 565–68.

676. *Id.* at 571–74.

crime. He maintained that he gave a different statement, standing by his trial testimony.⁶⁷⁷ He also denied making statements about white devils, she-devils, or the use of black pepper to Sutton or Baker or anyone else,⁶⁷⁸ and testified that he did not believe that Allah wanted him to kill white people.⁶⁷⁹

e. Victims' Family Response

Near the end of the hearing, the Commission received statements from the victims' family. A granddaughter of Josephine Davis and niece of Aileen spoke and vigorously challenged that any new evidence had been present, sharply criticizing the work of Sledge's attorney Christine Mumma.⁶⁸⁰

10. Commission Decision

At the conclusion of the hearing, the commissioners voted unanimously that there was sufficient evidence of factual innocence to merit judicial review.⁶⁸¹

11. Three-Judge Panel Proceedings and Decision

The hearing was held on January 23, 2015. The Commission brief, transcript, handouts, opinion, and a number of exhibits were introduced as evidence. Columbus County Clerk of Court Rita Batchelor and Meghan Clement, an expert in DNA analysis employed by Cellmark Forensics were called as witnesses.⁶⁸² At that

677. *Id.* at 589–90. *See supra* text accompanying note 610. When Little testified regarding Sledge's statement, the Commission's questioning brought out that newspaper coverage of the crime before Sledge's statement described throats being cut and lots of blood. Sledge Hearing Transcript, *supra* note 557, at 111. An article the day after the murders also indicated that the crime involved a tremendous struggle. *Id.* Also, the fact that it was the crime scene should have been quite obvious since a picture of the crime scene that appeared in the newspaper before Sledge's statement showed the house with a road in front of it and a sign reading "Keep Out," and below it, the word "Sheriff." *Id.* at 113.

678. *Id.* at 594–95.

679. *Id.* at 600.

680. *Id.* at 622–34. Near the beginning of her statement, Katherine Brown stated: "I think my family is being tag teamed by Christine Mumma. The question is why are you putting my family through this. New evidence? No such thing." *Id.* at 625. As she concluded, she said: "It has always been the Davis family's opinion that our grandmother, Josephine Davis, and Aileen Davis were brutally murdered by Joseph Sledge, that he was the sole perpetrator The past three days have not changed our minds, not one bit." *Id.* at 633. In the WRAL documentary, it noted the reluctance of the family to accept Sledge's innocence and reported that one of its photographers had been assaulted by a family member during its filming. *See An Obvious Suspect*, *supra* note 556.

681. Sledge Hearing Transcript, *supra* note note 557, at 636.

682. Sledge Three-Judge Panel Transcript, *supra* note 638, at 7, 50, 53.

point, both District Attorney Jon David and Sledge's attorney Christine Mumma addressed the panel, with the district attorney joining the defense position that the charges should be dismissed with prejudice because the evidence showed Sledge was innocent.⁶⁸³

The district attorney's statement provides a useful analysis of the case for innocence.⁶⁸⁴ He compared the evidence supporting Sledge's conviction to a three-legged stool: circumstantial evidence flowing from Sledge's escape from a nearby prison shortly before the crime, the testimony of the informants, and the hair evidence.⁶⁸⁵ Sledge's escape and its suggestion of his involvement in the homicides remained, although David acknowledged that the White Lake facility had such minimal security that escapes were numerous and the significance of this evidence was accordingly somewhat reduced.⁶⁸⁶ The other two elements of the proof, which had previously been stronger, had been significantly undercut by later revelations.

Sutton had only been cross-examined at trial on his final statement. The other statements disclosed in the Commission's examination showed that his story was evolving, changing, and strengthening over time. Those other statements certainly helped to discredit Sutton's testimony. While Baker had given multiple statements, some of which had inconsistent elements, he remained steadfast in saying in these statements that he testified falsely that Sledge said he was involved in the murders and acknowledged that his incriminating testimony was fabricated.⁶⁸⁷

While some DNA evidence from physical evidence found at the crime scene might have been unrelated to the murders, David believed the hairs found on the victim's abdomen were likely left by the perpetrator. After the DNA testing of all the hairs, the evidence was exposed in a much different light than it was when presented to the jury panel that convicted Sledge.⁶⁸⁸ In addition, fingerprints that were left in blood, arguably by the perpetrator, had been shown by

683. *Id.* at 90–122.

684. *Id.* at 90–116. The district attorney began his statement discussing process. He spoke of the importance of finality: “When a jury speaks, that verdict is supposed to speak throughout time.” *Id.* at 93. He said he believed stakeholders in the system, including victims, would trust a process that involved a comprehensive investigation followed by a public hearing. He embraced the Commission process that provided a neutral and independent fact-finding agency and complimented the Commission investigators for their professionalism. *Id.* at 93–94, 97–98.

685. *Id.* at 98.

686. *Id.* at 100.

687. *Id.* at 104–05.

688. *Id.* at 102–03.

the Commission investigation to have been left by someone other than Sledge.⁶⁸⁹ Near the end of his statement, District Attorney David apologized to Sledge on behalf of the state.⁶⁹⁰

In her statement, Mumma expressed her appreciation for the work of the Commission.⁶⁹¹ While gratified at the result, she spoke of the tunnel vision that directed the prosecution relentlessly toward Sledge⁶⁹² and expressed frustration with the delays that had kept him needlessly confined.⁶⁹³

The three-judge panel concluded that Sledge had established his innocence by clear and convincing evidence and ordered his immediate release.⁶⁹⁴

G. *The Charles McInnis Case*

Like the *Brown & McCollum* cases, the *McInnis* case was resolved by presenting evidence developed by the Commission to a judge through a motion for post-conviction relief. In this case, District Attorney Kristy Newton filed the motion to speed McInnis' release after a DNA test secured by the Commission established his innocence. The information regarding this case is far less detailed than the others examined in this Article because the prosecutor's determination of innocence based on DNA led to a truncated procedure and a summarized version of critical facts in court.

1. The Crime

In the early morning hours of February 23, 1988, Frances Fletcher, who was eighty-one, was the victim of burglary, armed robbery, and rape. The crime occurred in Laurinburg, North Carolina, a small town in southeastern North Carolina. After going to bed, Fletcher was awakened by a noise and got up to investigate. As she looked out the windows of her house for the source of the noise,

689. *Id.* at 106. David noted that this case was different from other Commission cases, which not only pointed away from the defendant but pointed towards an identifiable person. The evidence in this case pointed away from Sledge but did not yet identify the guilty party. *Id.* at 114–15.

690. *Id.* at 110.

691. *Id.* at 117, 121–22.

692. *Id.* at 120–21.

693. *Id.* at 119. *See* Locke, *supra* note 613 (recounting the efforts of Sledge to secure DNA testing of the physical evidence and the years of delay in locating and testing it).

694. Decision of Three-Judge Panel Pursuant to N.C. Gen. Stat. § 15A-1469 at 2, *State v. Sledge* 78-CRS-2415, 78-CRS-2416 (N.C. Super. Ct. Jan. 23, 2015), <http://www.innocencecommission-nc.gov/Forms/pdf/Sledge/three-judge-panel-opinion-state-vs-sledge.pdf> [<https://perma.cc/7M3K-EA5D>].

she was attacked from behind by a man who had gained entry. He stabbed her in the shoulder with a letter opener, with the blade breaking off and remaining embedded there. The man then dragged Fletcher into her bedroom, raped her twice anally, and attempted to penetrate her vaginally. He took money from her pocketbook and then fled.⁶⁹⁵

Fletcher told law enforcement that the lights were off in her house and a penlight carried by the perpetrator only partially illuminated his features. She gave a description of a black male in his late teens to early twenties with dark complexion and short hair. He was of average height, slender to average build, and very articulate. Fletcher believed she would not be able to identify him by his physical appearance, but she thought she could recognize his voice if she heard it again.⁶⁹⁶

McInnis was a suspect from the beginning of the investigation.⁶⁹⁷ He had on three instances been involved in deviant behaviors involving older women, which included breaking into a home and exposing himself or asking for sex. In one of those incidents, he was convicted of indecent exposure, which “put him on the radar of the Laurinburg Police Department.”⁶⁹⁸ On March 18, 1988, according to lead investigator Jack Poe, an informant reported that McInnis had asked if he had heard about the attack on Fletcher, and after the informant responded that he had, McInnis said “I did that.”⁶⁹⁹

McInnis was arrested the next day and charged with first-degree burglary, armed robbery, and first-degree rape. Poe reported that after advising McInnis of his Miranda rights, McInnis denied any involvement in the Fletcher attack. According to Poe’s report, two days later, McInnis, who was in jail, asked to speak to Poe. Poe re-advised him of his rights, and McInnis gave a detailed account of his whereabouts on the afternoon before and the night of the attack, providing names of witnesses who could verify his alibi. Shortly

695. Motion for Appropriate Relief Transcript at 3–4, *State v. McInnis*, 88-CRS-1422 (N.C. Super. Ct. Aug. 10, 2015) [hereinafter *McInnis Motion for Appropriate Relief Transcript*], <http://www.innocencecommission-nc.gov/Forms/pdf/McInnis/Transcript.pdf> [<https://perma.cc/3Z4M-XG9J>].

696. *Id.* at 4–5.

697. *Laurinburg Man Arrested in Rape*, FAYETTEVILLE OBSERVER (Mar. 22, 1988), http://www.fayobserver.com/news/local/laurinburg-man-arrested-in-rape/article_338fb227-76da-50df-88c2-e6ab1e57bfb5.html [<https://perma.cc/S9EF-35BM>] (quoting Police Chief Quick that “[h]e has been a prime suspect from the outset of the investigation”).

698. *McInnis Motion for Appropriate Relief Transcript*, *supra* note 695, at 5 (explanation by District Attorney Newton).

699. *Id.* at 5–6.

thereafter, Poe and an SBI agent interviewed these alibi witnesses and they supported his alibi. Two female relatives told law enforcement that McInnis came to his niece's residence just after midnight and watched TV with one of them until she fell asleep. The other relative had gone back to bed shortly after he arrived, and when she got up around 4:00 a.m. to get ready for work, she saw McInnis in the living room sleeping in a chair.⁷⁰⁰ Newton had no explanation for why the alibi was discounted.⁷⁰¹

In October 1988, when the case was being called for trial, Poe reported that McInnis asked to speak with him again. According to Poe, McInnis refused to speak with his attorney and wanted to speak solely with Poe. In an interview at the jail, after again being advised of his Miranda rights, McInnis gave a statement admitting that he broke into Fletcher's home and raped her.⁷⁰² However, according to Newton, the confession did not track the facts of the rape as described by the victim and as shown by the physical evidence. McInnis was unable to explain how he gained entry, which was through a window. He described the attack as beginning in the bedroom, when the victim stated and the physical evidence showed that the attack commenced in the living room. He made only a conclusory statement about committing a rape, when the victim was anally raped twice and the perpetrator attempted to rape her vaginally.⁷⁰³

On October 25, 1988, McInnis entered guilty pleas to all three charges and was sentenced to life imprisonment on the rape conviction. This sentence was to be followed by a sentence of twenty years for the first-degree burglary and armed robbery convictions.⁷⁰⁴

2. Commission Investigation

District Attorney Newton indicated that she had become aware of McInnis' claim of innocence five years earlier, but at that time she was told by the Laurinburg Police Department administration that the physical evidence had been destroyed.⁷⁰⁵ The activity critical to McInnis' exoneration occurred after the Commission contacted Newton in March 2015 by letter stating that McInnis had filed a claim of factual innocence.⁷⁰⁶ Newton contacted Laurinburg Police Chief

700. *Id.* at 6–7.

701. *Id.* at 7.

702. *Id.* at 7–9.

703. *Id.* at 9–10.

704. *Id.* at 10, 18.

705. *Id.* at 10–11.

706. *Id.*

Darwin Williams, who had taken his position recently. Williams wanted to conduct his own search for the evidence in response to the Commission's inquiry, and after an extensive search of multiple evidence storage facilities, the key physical evidence—the rectal swabs—was located.⁷⁰⁷ This evidence was given to the Commission investigators for DNA testing.⁷⁰⁸

In 1988, DNA testing was requested by the Laurinburg Police Department, but Cellmark Diagnostics could not generate a profile using then-available technology.⁷⁰⁹ However, in 2015 using Y-STR testing, which looks only at male DNA, Cellmark Forensics determined that McInnis was excluded as a contributor of the male DNA recovered from the rectal swab.⁷¹⁰ When Sharon Stellato of the Commission met with Newton on August 5, 2015, and provided the DNA testing results, Newton clearly recognized McInnis' innocence.⁷¹¹ She knew that the victim had stated there was one—and only one—perpetrator. Accordingly, the clear conclusion shown by the new testing was that McInnis was innocent.⁷¹²

Shortly thereafter District Attorney Newton filed her own motion asking for McInnis' immediate release.⁷¹³ Defense counsel was appointed the next day, and a prompt hearing on the motion was scheduled. At a hearing on August 10, 2015, only five days later, Judge Tanya T. Wallace granted the motion vacating his convictions, Newton dismissed all charges, and the court ordered McInnis' immediate release.⁷¹⁴

3. Significant Features of the Erroneous Conviction

The *McInnis* case provides only summary lessons because of the truncated nature of the Commission investigation and the limited presentation of facts. Nevertheless, it fits a pattern of wrongful convictions that is disturbing in the similarity to other cases. Because of past sexually deviant behavior, McInnis was an obvious suspect. As a result, it is likely that tunnel vision began early in the investigation and was a powerful independent force throughout the investigation and short life of the case. An informant provided the critical evidence

707. *Id.* at 11–12.

708. *Id.*

709. *Id.* at 18.

710. *Id.* at 18–19.

711. *Id.* at 12.

712. *Id.* (innocence conclusion by Newton); *id.* at 19 (innocence conclusion by Judge Tanya Wallace).

713. *Id.* at 13.

714. *Id.* at 19–20.

for an arrest,⁷¹⁵ but even in the police file available to Newton, the informant was not identified. Further, whether the informant's claim, which has now been proven false by DNA testing, deserved the weight it was given cannot be assessed.⁷¹⁶ McInnis' alibi, which would generally be considered weak because it was provided by family members, was never challenged, but instead was apparently ignored by law enforcement.

The confession given by McInnis arose inexplicably, and the contents of this confession did not include facts that only the perpetrator could have known. Indeed, this confession should have been treated as suspect because it conflicted with facts that the perpetrator would certainly have known. While the confession makes little sense, the confession and guilty plea when considered together make no sense at all. Before McInnis provided his confession, the case against him was quite weak. His confession provided substantial evidence against him and perhaps made the guilty plea sensible, but he received virtually no benefit from the plea. McInnis faced a maximum sentence of life plus forty years on his charges, and his guilty plea resulted in a sentence that was little different—life plus twenty years.⁷¹⁷

Why did the confession occur, and why was the guilty plea entered? Although not referred to in the judicial proceedings, McInnis was apparently a vulnerable individual, perhaps not that different from Womble, Brown, or McCollum. His reading level was approximately at the fourth grade level.⁷¹⁸

This case appears to fit the unfortunate pattern of false convictions. This pattern often involves a facially-obvious suspect, a terrifying crime, tunnel vision, questionable informants, low-quality false confessions, and mentally or socially vulnerable individuals. The irrefutable DNA evidence in this case once again confirms that innocent individuals, particularly vulnerable individuals, do give false confessions. Furthermore, this case shows that these individuals sometimes even plead guilty to crimes they did not commit.

715. *Id.* at 5–6.

716. *Id.* at 8.

717. See Maurice Possley, *The National Registry of Exonerations—Edward McInnis* (Aug. 15, 2015), <https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4733> [<https://perma.cc/QAW5-69X2>].

718. *Id.*

4. The Commission's Contribution

The power of the Commission as a neutral state agency, which commands the respect of law enforcement, buttressed by its own ability to conduct searches for evidence, appears once again to have paid significant dividends. Much like the *Grimes* case, the Commission's request in *McInnis* prompted a renewed search by law enforcement that located critical evidence previously reported as destroyed or missing. In helping to produce the rectal swab for state-of-the-art testing, the Commission effectively freed an innocent man wrongfully confined for over twenty-five years.

5. Developing a Dual Track for Resolution of Claims of Factual Innocence Investigated by the Commission

In this case, the claim of factual innocence was successfully demonstrated using the Commission's preliminary investigative results through a post-conviction motion proceeding, rather than the Commission hearing and three-judge panel process. The *Brown & McCollum* cases, which chronologically immediately preceded it, followed that same alternative track, and it was followed later in 2015 by the exoneration of Isbell, Mills and Williams through a post-conviction motion filed after an unsuccessful Commission proceeding. Together these recent cases demonstrate an element of flexibility in the Commission's operation.

The Commission's contribution can be in the form of an inquisitorial, expert, and empowered investigation. This investigative process can combine with a sensible, although demanding, adjudicatory process of Commission hearing and three-judge panel resolution. In another form, it can contribute solely its enhanced ability to find and analyze evidence and neutrally and thoroughly investigate the case, which then is adjudicated through the traditional post-conviction process. The utilization of the post-conviction process as an alternative or supplemental process shows growth and flexibility in the Commission's model as it nears the end of its first decade in operation.

III. THE COMMISSION'S CASES AS PART OF THE BODY OF MODERN WRONGFUL CONVICTIONS: LESSONS FOR ACHIEVING EXONERATIONS OF THE FACTUALLY INNOCENT

The narratives of the Commission's seven exoneration cases have two major components. The first is how these factually innocent defendants came to be wrongfully convicted. The factors that led to

wrongful conviction reflect established causes generally found by scholars who have studied modern exonerations.⁷¹⁹ The second part is the process by which the Commission established innocence. Through the case studies explored above, lessons can be learned from the Commission's exoneration process. These lessons concerning the error correction process, which I take up here, have been less extensively examined than the factors contributing to wrongful convictions.

A. *The "Causes" of Wrongful Convictions*

Although the seven cases handled by the Commission that resulted in exonerations constitute a small sample, these cases reflect characteristics often present in modern exonerations. To begin, all of these cases involved the crimes of rape and murder, as do the vast majority of modern exonerations.⁷²⁰ Professor Samuel Gross has suggested two major reasons explaining why murder and rape cases predominate. First, DNA evidence, which has been the primary source of exonerations, is most frequently available and dispositive in rape cases.⁷²¹ Second, exonerations generally take substantial time and effort, which are usually only expended if a defendant has been given a very lengthy sentence. This means even lesser felonies with comparatively light sentences are unlikely candidates for exoneration.⁷²² Although DNA evidence or other forensic results did not always play a role in the Commission's exonerations, each of its exonerations did take many years and generally substantial effort.

Professor Brandon Garrett, who examined the first 200 DNA exonerations, identified four major "causes" of wrongful convictions. First, erroneous eyewitness identifications were present in a vast majority of those cases—79%. Mistaken identifications are chiefly part of rape exonerations. Second, 57% of the cases contained erroneous or overstated forensic evidence, chiefly serology and microscopic hair comparison. Third, false informant testimony appeared in 18% of the cases. Fourth, 16% of the defendants falsely

719. See generally Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

720. Gross et al., *supra* note 719, at 528–29 (finding in a study of DNA and other exonerations that 96% of the cases between 1989 and 2003 involved convictions for murder or rape or sexual assault).

721. *Id.* at 530–31 (contrasting large number of exonerations based on DNA in rape cases and very few in armed robbery cases).

722. *Id.* at 535–36.

confessed.⁷²³ False confessions are predominate in murder exonerations⁷²⁴ and have been found to be particularly likely to contribute to the wrongful conviction of defendants who are young and those with mental disabilities.⁷²⁵

The cases examined in this Article generally reflect the operation of these causes. Mistaken eyewitness identifications were underrepresented in the Commission exoneration cases, with only *Grimes* principally depending on erroneous identification testimony and *Kagonyera & Wilcoxson* involving eyewitness identification secondarily.⁷²⁶ As is frequently the pattern, the erroneous conviction in *Grimes*, which was a rape case with a surviving victim, principally resulted from the victim's mistaken eyewitness identification.⁷²⁷ Forensic evidence errors were major components of three of the wrongful conviction cases handled by the Commission—*Taylor* (serology), *Grimes* (microscopic hair comparison), and *Sledge* (microscopic hair comparison). False confessions were present in four of the seven cases—*Kagonyera & Wilcoxson*, *Womble*, *Brown & McCollum*, and *McInnis*. Also in four cases, informants testified and/or played major roles in the wrongful convictions—*Taylor*,

723. Garrett, *supra* note 719, at 60.

724. Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions after a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 844 (2010) (noting that in one study approximately two-thirds of DNA exonerations in homicide cases involved false confessions); Gross et al., *supra* note 719, at 544 (finding that 20% of murder exonerations, but only 7% of rape exonerations, involve false confessions).

725. Gould & Leo, *supra* note 724, at 847–48 (discussing the greater likelihood of false confessions from cognitively impaired and youthful suspects, who are highly suggestible and compliant); Gross et al., *supra* note 719, at 545 (showing that false confessions are heavily concentrated among defendants under eighteen and the mentally disabled, with both groups among the most vulnerable).

726. The under-representation results in part from the nature of the six cases. Three of them involved homicides in which there were no surviving eyewitness. In a fourth homicide case, the surviving eyewitness did not see the faces of either of the two men who committed the crime and could only describe their race and height of the men. In *Kagonyera & Wilcoxson*, Shaun Bowman, the son of the victim who also witnessed the fatal shooting, identified one of the perpetrators from a photo lineup. *See supra* text accompanying note 203. However, he later explained to Commission investigators that his photo identification of one man and identification of others by their “street names” was based on information he received about the case during the month between the crime and his police interview. In other words, his recollection was not based on his observations during the crime. *See supra* text accompanying notes 292–294.

727. However, *McInnis*, the other rape case, was not dependent on mistaken identification. This may have been because the victim indicated she did not believe she could identify the perpetrator by appearance. *See supra* text accompanying note 696. Instead, the conviction in *McInnis* turned on a confession, much like homicide cases that lack eyewitnesses. *See infra* text accompanying notes 717–718, 733.

Sledge, Brown & McCollum, and *McInnis*.⁷²⁸ *Kagonyera & Wilcoxson*, *Womble*, and *Brown & McCollum* are murder cases that depended on confessions. The confessions in *Womble* and *Brown & McCollum* were obtained from mentally disabled defendants, and *Brown & McCollum* were also young defendants—fifteen and nineteen, respectively—when they confessed.

In their examination of exonerations, Professors Jon Gould and Richard Leo have argued that in addition to the four factors identified by Garrett, several other “causes” of wrongful convictions can be identified from the exoneration cases. Perhaps the most significant is the general condition of “tunnel vision,” which can afflict various members of the criminal justice community and can occur at any point in the process. Tunnel vision exists when “criminal justice professionals ‘focus on a suspect, select and filter the evidence that will “build a case” for conviction, while ignoring or suppressing evidence that points away from guilt.’ ”⁷²⁹ The other two causes Gould and Leo identify are prosecutorial misconduct and inadequate defense representation.⁷³⁰

In a follow-up article, Professors Gould, Leo, and others attempt to draw more than correlations from the factors found in wrongful conviction cases, and instead try to move toward conclusions about what the causes are.⁷³¹ They postulate a fascinating relationship between weak government cases and erroneous convictions. Somewhat counterintuitively, weak government cases tend to lead to erroneous convictions rather than what the authors describe as “near miss” dismissals, acquittals, or early exonerations. The authors find that weak cases encourage prosecutors to engage in behaviors designed to bolster their case rather than test them. A weak government case might be called a condition conducive to a wrongful conviction. One particularly questionable type of bolstering evidence is the testimony of a jailhouse informant claiming the defendant made

728. In addition, numerous informants provided false, incriminating statements in *Kagonyera & Wilcoxson*. However, since the case was resolved by guilty plea, none of the informants ultimately testified. See *supra* text accompanying notes 206–208.

729. Gould & Leo, *supra* note 724, at 851. “Confirmation bias” is related to or a subset of tunnel vision. It causes investigators to unconsciously seek confirming information supporting their preexisting beliefs. See Kerala Thie Cowart, *On Responsible Prosecutorial Discretion*, 44 HARV. C.R.-C.L. L. REV. 597, 603 (2009).

730. Gould & Leo, *supra* note 724, at 854–56.

731. See Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 479–80 (2014).

an incriminating statement, which is often available to receptive investigators.⁷³²

In homicide cases, Professor Gross posits that a similar dynamic operates and may explain why erroneous convictions often involved false confessions. Despite having dispositive DNA or other forensic evidence less frequently, homicide cases have a higher clearance rate than other serious crimes, including rape. This appears to be because their investigation is given very high priority and more resources. Unlike rape cases in which the victim is often an eyewitness, murder cases often lack any eyewitnesses at all. In murder investigations, police are more likely to expend the prolonged effort required to produce a false confession because they believe no other available evidence would likely be sufficient to convict.⁷³³

Professors Gould and Leo draw one other interesting conclusion: forensic evidence errors tend to compound earlier errors in wrongful conviction cases rather than correct them. In some situations, the results of state run forensic labs merely echo the incriminating evidence in the state's case rather than independently assessing the defendant's guilt.⁷³⁴ Within the Commission's cases, the *Taylor* case clearly fits this characterization. In that case, forensic blood analysis by the SBI lab sought to confirm rather than independently test the prosecution's case. In the three-judge panel hearing, Dwayne Deaver testified that the lab was instructed to report only initial positive results, even if later tests did not confirm these positive results. Subsequent investigation showed that the agency saw its role as supporting the prosecution's case, rather than neutrally analyzing forensic evidence.⁷³⁵

732. Gould et al., *supra* note 731, at 501–02. See Gross et. al, *supra* note 719, at 542–44 (noting that the high-stakes nature of murder cases and the substantial rewards offered to codefendants and informants combine to increase the likelihood that false evidence will be produced).

733. Gross et al., *supra* note 719, at 542–43.

734. *Id.* at 500.

735. See *supra* text accompanying notes 176–178. Because the hair in *Grimes* was lost or destroyed, no concrete conclusions can be reached on this issue. Nonetheless, one can wonder whether a confirmation bias may have factored into the positive hair comparison report in that case. There was little protection against examiner error since the procedures at the time of the report did not even require a second examiner to do a peer confirmation review. Furthermore, even the safeguard of an “objective” second review would have provided only limited protection given the highly inaccurate methodology of the time, which has been documented by modern studies. See *supra* text accompanying note 369; see also Gould & Leo, *supra* note 724, at 853 (recounting two studies, one of which reported that very high error rates in a majority of the 235 forensic labs examined, while the other report showed that error rates can substantially reduced if correct methodology is used). In *Sledge*, tunnel vision may have been to blame for a key oversight. Investigators placed

1. The Difficulty of Determining the “Cause” of a Wrongful Conviction

For many reasons, using statistical analysis of the errors in exonerations⁷³⁶ or case studies⁷³⁷ does not necessarily reveal the cause of wrongful convictions. From those tools, researchers learn the factors that correlate with wrongful convictions, such as mistaken eyewitness identification, false informant testimony, and false confessions. The easiest way to show that the presence of one or more of these factors is not the cause of wrongful convictions is simple: the same wrongful conviction risk factors are often present in cases that do not result in wrongful convictions. Oftentimes, the innocent suspect is not convicted, which might be called a “near miss.”⁷³⁸ For this reason, rather than causes, these factors are more appropriately considered “contributing sources.”⁷³⁹

Wrongful convictions are complex systemic failures.⁷⁴⁰ They, like “near misses,” start with some investigative error, such as a mistaken identification or an informant’s tip. The problem in wrongful convictions is that such errors are not corrected but often persist for long periods after conviction, as the cases examined in this Article show. For a wrongful conviction, an unfortunate combination of

no apparent significance on the fact that head hairs from an African American were recovered from one of the victims’ bodies while Sledge had a shaved head and therefore could not have been the contributor of the foreign head hairs. *See supra* text accompanying note 586.

736. Professors Sam Gross and Barbara O’Brien warn that we can say very little about the general causes of false convictions because we know so little about their occurrence. The exonerations we know about were overwhelmingly based on convictions at trial and the great majority of defendants were convicted of murder or rape. These are simply not representative cases. Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930–31 (2008).

Nevertheless, while we know these cases are not representative, the exonerations do consistently reveal a set of common factors that appear to cumulatively contribute to erroneous convictions. We can identify what must have gone wrong once the DNA evidence establishes that an individual is innocent. Any eyewitnesses who made identifications, suspects who confessed, forensic science results that indicated guilt, and jailhouse informants who testified that suspects confessed must have been wrong. *Id.* at 932. However, we do not generally know, for example, *why* an erroneous identification was made. *Id.* at 933.

737. Gould & Leo, *supra* note 724, at 840 (noting that careful case studies that apparently show the “cause” in a given wrongful conviction cannot truly establish the cause of wrongful convictions because the study cannot establish that such errors do not occur in other cases where the defendant was not convicted or that there are no other types of errors that lead to wrongful convictions).

738. Gould et al., *supra* note 731, at 483.

739. Gould & Leo, *supra* note 724, at 827, 840–41.

740. *Id.* at 860; Gould et al., *supra* note 731, at 503–08.

factors and circumstances is generally required. The initial error or errors likely related to one of the major contributing factors identified through research. The error is likely to continue under certain conditions, such as a high stakes crime and relatively weak or ambiguous prosecution evidence. When such initial errors persist, it is often because some form of “tunnel vision” developed,⁷⁴¹ and nothing, such as a strong defense presentation, intervened to break the march toward conviction.⁷⁴²

This Article has described the initial mistake in each of these cases and followed its unbroken path to conviction and beyond. In each, one observes some form of “tunnel vision,” and in some cases, such as *Sledge*, tunnel vision assumed a prominent independent role. In other cases, it operated in the background, influencing and distorting the conclusions reached from the available evidence.

It took a complex systemic breakdown to produce each wrongful conviction that the Commission addressed. Perhaps the length and complexity of the process that led to the prolonged imprisonment of the nine men discussed above explains why undoing these errors required a very substantial effort by a neutral expert agency with a broad mandate and established authority.

2. Route to Exoneration

Once the criminal justice system has malfunctioned past the point of catching the error or errors that led to investigating, charging, prosecuting, and convicting an innocent individual, past the point of the “near miss” to a conviction, correcting a wrongful conviction is generally not easy. In his study of the first 200 DNA exonerations, Professor Garrett found that only rarely did a court reverse a conviction based on factual claims challenging as erroneous the evidence that supported their convictions.⁷⁴³ Overall these erroneous convictions were reversed for any type of legal error at only a 14% rate.⁷⁴⁴ All 200 exonerations examined by Garrett’s study ultimately

741. Gould et al., *supra* note 731, at 503 (suggesting that “tunnel vision” is a useful general framework for understanding the systemic failures that separate wrongful convictions from “near misses,” where the error is caught).

742. Gould & Leo, *supra* note 724, at 840–41 (discussing the theory of tracing the path of the error, which might have been broken at any point).

743. Three of the 200 received relief based on *Brady* claims, which indirectly relates to innocence. Garrett, *supra* note 719, at 110.

744. *Id.* at 61. The reversal rate is only 9% for non-capital cases. The reversal rate for the matched non-DNA exoneration cases is 10%, which is a statistically insignificant difference. *Id.*

received relief through DNA testing.⁷⁴⁵ However, many defendants faced persistent obstacles from the prosecution to obtaining relief. For example, twelve were convicted at trial despite DNA testing that excluded them as contributors of the recovered DNA; these individuals were only exonerated when the DNA testing conclusively identified another person.⁷⁴⁶

The cases handled by the Commission involved situations where a wrongful conviction had occurred and the appellate process and often earlier examinations of the type successful in the DNA exonerations had failed. While none of these alternative routes is easy, at least some of the easier routes to release or exoneration had already proven unsuccessful.

B. The Strengths of the Commission

The cases examined in this Article suggest that the strength of the Commission derives from basic elements of its structure. The Commission is a neutral expert agency with a broad mandate and substantial authority. The Commission also operates in an inquisitorial fashion. These features give it the capacity and ability, once evidence of factual innocence not previously examined has been presented, to basically re-investigate the case. In the process, it can identify the missteps and determine whether guilt is corroborated or at least left intact or whether innocence is established. Having a neutral agency with the goal of discerning whether substantial evidence of factual innocence exists is impressive and equipping it with the tools to thoroughly reexamine each case gives it a real opportunity to succeed. The various features of the Commission that have contributed to its success are discussed in the remainder of this section. Some of these features are not cleanly separated and some overlap will be observed.

1. Access to Case Files, Physical Evidence, and Investigative Databases

The success of the Commission in a number of its cases was founded on access to information and evidence. In *Grimes*, the centerpiece of the exoneration was a long-missing fingerprint card containing the real perpetrator's fingerprints. This evidence was produced in response to the simple request by the Commission for a file search. Perhaps the Hickory Police Department found it by luck after having failed to locate it in response to earlier requests made

⁷⁴⁵ *Id.* at 118.

⁷⁴⁶ *Id.* at 120.

over the years by newspaper reporters and attorneys. However, one suspects this search may have been more thorough because it was requested by a state agency with its own investigative authority. The second stage of the fingerprint card evidence was having the prints entered into the state's automated fingerprint identification system, which produced a match to the apparent actual perpetrator of the rape. In *Brown & McCollum*, a major part of the successful outcome depended on securing the cooperation of state investigative agencies in entering DNA into the CODIS system for periodic searches of the database.

Official state status provided important benefits. In *Kagonyera & Wilcoxson*, the critical evidence was secured through access to the full investigative file from the SBI, which comes to the Commission automatically upon official request. The key information, a CODIS hit on an alternative perpetrator, had been made available to the prosecution and should have been communicated to the defendants for their potential use. However, it had not previously been shared with the convicted defendants and may never have been available for their exoneration had it not been delivered to the Commission.

In *Sledge*, the access given to Commission investigators to search evidence storage areas produced the fingerprint evidence and physical evidence for thorough re-examination. That process helped negate the possibility that incriminating evidence had been missed and affirmatively revealed a number of prints. Because of the prints' location, they were likely left by the real perpetrator and not by Sledge. The Commission investigators found and analyzed the records of a series of interviews with a jailhouse informant who provided increasingly detailed and incriminating statements of a conversation that should have been freshest in his mind at the initial interview. Their investigation undermined the credibility of the one remaining item of the prosecution's evidence. Those documents had been unavailable to Sledge's trial counsel. A change in the state's discovery laws made those documents legally available, but without the authority to search for the files and the sophistication and resources to complete the process, the critical information could well have remained undisclosed.

2. A Hardworking and Thorough Agency with Growing Skill

In a number of cases, the investigative effort of the Commission culminated in expert examination of evidence. The examination was often done in part by the SBI. However, in a number of instances, that examination was supplemented by further testing or analysis by

private laboratories and specialized experts. The *Kagonyera & Wilcoxson* case provides an impressive example that involved service station surveillance video of a car and the apparent perpetrators. The videotape had been almost completely ruined by the subsequent recording of a TV show over the relevant portion. The Commission secured the assistance of the SBI to make visible and enhance what little of the original recording remained. The Commission then enlisted an impressive expert on the arcane subject of American automobiles to identify the year, make, and model of the car seen in the unspoiled portion of the tape. In the end, the videotape, which had apparently been erroneously viewed by law enforcement as incriminating Kagonyera because it showed what they believed was his car, established through the expert's analysis that the car was in fact of a different make and model. That revelation helped exonerate both men because the car identified in the video matched the vehicle of one of the alternative suspects.

In *Sledge*, the mitochondrial DNA examination of hairs excluded Sledge as the source of all the hairs found on the victim's abdomen. These results largely established the basis for Sledge's exoneration. In addition, the thorough re-processing of all the physical evidence using highly sensitive DNA testing, and careful re-examination of the fingerprint evidence, which showed Sledge had not left unidentified fingerprints that were likely those of the murderer, were very helpful in cumulative effect. Each piece of evidence reinforced the other and together they established that absolutely nothing at the crime scene supported Sledge's guilt after an exhaustive, professional, and sophisticated re-examination.

3. A Neutral, Inquisitorial Investigative Agency Culminating in a Public Presentation to a Diverse Group of Commissioners

The exoneration of Womble, Grimes, Brown, and McCollum also depended on the hard work of the Commission's investigators. Specifically, this work involved the ordinary task of interviewing and then the critically important but tedious work of painstakingly investigating alternative paths to factual innocence. Commission investigators also assembled criminal records and gathered background information regarding alternative perpetrators in *Grimes* and *Brown & McCollum*. Tasks of this type can be conducted by investigators for the police or the defense. However, the neutrality of the Commission and its demonstrated interest in searching for and presenting evidence that would prove the claimant guilty or innocent makes the skilled work more persuasive.

In a case such as *Womble*, where the exoneration depended upon the truthfulness of the statements of a convicted murderer that *Womble* was not involved at all in the crime, finding witnesses who could provide corroboration or refutation of the perpetrator's claim, who could demonstrate a thorough and even-handed investigation, were critical to the overall persuasive case for innocence. The credibility and neutrality of the Commission's investigation were also important, albeit arguably to a lesser degree, in establishing the innocence of Grimes, Brown, and McCollum.

One can generalize from *Womble* and the other cases that the Commission's neutral inquisitorial structure makes exoneration viable in non-DNA exonerations. In such cases, dispositive proof of innocence will more often be unavailable. Although perhaps not technically sufficient, the complete absence of proof of guilt may be all that can be shown in some of these cases. It was sufficient for the prosecutor in the *Womble* case. He said that he had examined all the materials in the Commission's investigation, and he could find no evidence of *Womble*'s guilt. He then went further and said that he was convinced of *Womble*'s innocence.⁷⁴⁷ Finding no evidence of guilt carries real weight and meaning when the materials were prepared by a neutral inquisitorial body, which is also thorough and expert, as described previously.

The effectiveness of the Commission also rests on the presentation of the findings of the investigative staff to the Commission in a generally public proceeding⁷⁴⁸ with witnesses testifying under oath before commissioners drawn from various constituencies in the criminal justice community. Neutrality in investigative effort and thoroughness in examination of the possibility of guilt as well as innocence is enforced by the necessity to openly air the results of the investigation to a decision-making group that is not biased towards or against any outcome.

4. A Neutral Agency Charged with Re-examination of the Evidence to Find Overlooked Innocence

The Commission is a state agency charged with neutrally re-examining cases in which the suspect has significant previously

⁷⁴⁷ See *supra* text accompanying note 487.

⁷⁴⁸ The Commission statute gives the Commission the discretion to hold public hearings, N.C. GEN. STAT. § 15A-1468(a) (2015), and the Commission has generally done so, except when no request was made. Conversation with Commission Executive Director Smith and Associate Director Stellato (Nov. 13, 2015), *supra* note 24.

unpresented evidence of factual innocence.⁷⁴⁹ Much meaning is packed within this description. The effort is conducted on behalf of the state by a state agency, which is expressing its commitment to exonerating the innocent. The investigation and review is to be conducted neutrally. The effort is concentrated on righting a wrong rather than affixing blame on those who conducted the initial investigation or prosecuting the case. However, the Commission is also charged with the duty of providing to appropriate authorities any evidence of guilt that its investigation develops. When performing its function of exonerating the innocent, the commission is also charged with providing any evidence it unearths regarding the actual perpetrator(s) to law enforcement.⁷⁵⁰ It does not represent the claimant, but instead is “a neutral fact finding agency” that “seek[s] the truth.”⁷⁵¹

The Commission’s status as a state agency has important actual and symbolic value. It gives legitimacy to the effort and demonstrates that the State of North Carolina places real importance on exonerating the wrongfully convicted. While respecting the importance of finality in criminal judgements, it recognizes that the interest in finality has its limits when factual innocence is at issue.

In conducting its investigation, the Commission seeks cooperation from the investigative and prosecutorial agencies involved in the original prosecution. It has encountered resistance, but it has also received cooperation in many situations. Although not fully consistent, the degree of cooperation has appeared to grow over the years with more frequent acquiescence by the prosecutor to the results reached by the Commission. This acquiescence has appeared

749. The Commission’s statute requires that there be “some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.” N.C. GEN. STAT. § 15A-1460(1) (2015).

750. The Commission has provided information to law enforcement regarding alternative perpetrators in the *Taylor, Kagonyera & Wilcoxson*, *Brown & McCollum*, and *McInnis* cases, DNA evidence developed in the *Sledge* case that is potentially useful in identifying the actual perpetrator, and evidence that led to an ongoing prosecution of the alternative perpetrator in *Grimes*. In 2015, investigations remained open or prosecutions were being conducted in each of these cases. Conversation with Commission Executive Director Smith and Associate Director Stellato (Nov. 13, 2015), *supra* note 24; e-mail from Robert P. Mosteller to Sharon Stellato (Nov. 17, 2015, 7:07 AM EST) (on file with *North Carolina Law Review*); e-mail response by Stellato, *supra* note 24.

751. See Tonya Brown, *DNA Clears Man After 27 Years in Prison for Rape in Scotland County*, ABC 15 NEWS (Aug. 12, 2015), <http://wpde.com/news/story.aspx?id=1242718> [<https://perma.cc/8JQ8-XRSQ>] (statement of Sharon Stellato, Commission’s Associate Director, after *McInnis*’ exoneration and Newton’s announced effort to find the actual perpetrator).

to increase in frequency as the perceived neutrality of the Commission has been established over its years of operation.

Even though the Commission was created by the recommendations of another commission involved in law reform, its investigations and hearings are focused on error correction rather than law reform, a distinction of significance. Professor James Doyle has recognized that one barrier to cooperation by authorities with investigations of wrongful convictions is the desire of leaders and managers of the “front line troops,” who may have made errors, not to humiliate them.⁷⁵² Of course, in the process of correcting the wrongful conviction, how the initial investigation erred will often be identified, and documenting errors may have some negative reputational impact on those who made the error. Nevertheless, a focus on finding innocence shifts attention to the positive task—making the error right—rather than pillorying those who originally made mistakes that led to the wrongful conviction. The focus on finding innocence by a neutral state agency rather than reaching that result through a challenge by an opposing adversary gives district attorneys a bit more leeway to agree with a Commission investigation that points toward innocence. This is not a defeat at the hands of an adversary, but the suggested finding of a state agency charged with developing the full facts and declaring innocence only when it is neutrally established.

C. The Commission’s Challenges

This Article is based almost exclusively on documents in the public record. To adequately develop proposals for improvement of the Commission’s operation, access to confidential records would likely be necessary. Despite this limitation, several issues merit comment.

1. Curtailing Reflexive Prosecutorial Opposition to Acknowledging Error

As discussed at the conclusion of the *Taylor* case and noted in the *Kagonyera & Wilcoxson* cases, the local prosecutors in those cases vigorously contested innocence before the respective three-judge panels. After the *Taylor* hearing was concluded, Professor James Coleman suggested that the Commission statute could be improved by requiring the designation of an independent prosecutor for the

⁷⁵² James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 130, 134 (2010).

Commission proceedings who had no responsibility for the prosecution or appeal.⁷⁵³ In a number of later cases, the prosecutors were much more receptive to the Commission's conclusion of substantial evidence of innocence. In these, the person occupying the district attorney's office had changed between the original conviction and the Commission proceedings. Whether the change in district attorney was significant in the more receptive position of the prosecutor's office is uncertain. Another potential explanation for this greater receptivity is that the work of the Commission has become better known and more willingly accepted as it has demonstrated professionalism, expertise, and neutrality.

The Commission statute provides that an independent prosecutor may be designated in the limited situation where the Commission finds "credible evidence of prosecutorial misconduct" in the case.⁷⁵⁴ The suggestion of a broader designation of an independent prosecutor to be responsible for representing the State at the three-judge panel stage is worthy of consideration, although a number of objections may be raised. The first is the financial costs and logistical difficulties of someone outside the office that prosecuted the case gaining full familiarity with the case. Second, while a different prosecutor would likely be less committed to protecting past decisions for institutional reasons, he or she may also not feel as able to agree that an error was made because the replacement prosecutor would be acting as a surrogate without a sense of the full authority that the responsible prosecutor naturally commands. Third, the concept of reducing adversarial commitment to a position would not, and likely could not, be applied equally to alter long-time defense representation.

Having noted the difficulties, the discussion of the next issue—the treatment of guilty pleas—suggests again the benefits of the involvement of a different prosecutor. Short of a change in the statute, prosecutors' offices should develop their own mechanisms to involve a more neutral prosecutor. These mechanisms might include assigning a prosecutor with no previous involvement in the case to

753. See Anne Blythe, *Taylor Case Brings Commission Renown*, NEWS & OBSERVER (Raleigh), Feb. 22, 2010, at 1A (reporting that Professor James Coleman believes the process would be improved if "[o]nce the commission decides to pass a case to a three-judge panel, an independent prosecutor [is assigned—]someone who isn't invested in the outcome of the original trial or appeals").

754. The Commission statute provides for appointment of a special prosecutor to represent the state, replacing the local prosecutor, in the rare circumstance that the Commission concludes there is "credible evidence of prosecutorial misconduct" in the case. N.C. GEN. STAT. § 15A-1469(a1) (2015).

participate in, and preferably take charge of, responding to the Commission's finding of substantial evidence of innocence.

2. Treatment of Guilty Plea Cases

The Commission's statute represents a compromise resolution for treating claims of innocence by defendants who pled guilty. It permits review, but claims proceed to a three-judge panel hearing only upon a unanimous vote of the commissioners. This compromise appeared workable based on the *Kagonyera & Wilcoxson* case, where a unanimous vote of the commissioners was secured and the claimants were exonerated by the three-judge panel that heard the case. However, it seemed to fail inexplicably when several years later the commissioners considered the claims of the other three convicted co-defendants in the Bowman homicide—Isbell, Mills, and Williams. As described on the Commission website, their cases were dismissed because the Commission vote was not unanimous.⁷⁵⁵ However, only in the *Williams* case was there a majority in favor of finding sufficient evidence of innocence to warrant three-judge panel consideration and that vote was five to three. The vote in the *Isbell* and *Mills* cases was four-to-four ties.⁷⁵⁶ Thus, the failure to send the cases to the three-judge panels was not the fault of the unanimity requirement for guilty plea cases.

Why was the vote different in the *Isbell*, *Mills*, and *Williams* cases after alternative suspects were so clearly established in the *Kagonyera & Wilcoxson* cases? The answer is unclear, but several differences in the evidence available to the Commission may offer a partial explanation. *Kagonyera* and *Wilcoxson* were clearly quite reluctant to admit guilt, while for *Isbell* and *Williams*, self-incriminating statements came much earlier. For *Williams*, such statements were quite numerous.⁷⁵⁷ Also, for these three cases, the prosecutor's office filed a statement with the Commission supporting their guilt.⁷⁵⁸

Should the unanimity rule be changed? This provision was added as part of compromises between the two legislative chambers, so the

755. See *supra* note 1 (noting the dismissal of the claim of co-defendants *Isbell*, *Mills*, and *Williams* because the vote was not unanimous).

756. E-mail by Robert P. Mosteller to Sharon Stellato, *supra* note 750; e-mail response by Stellato, *supra* note 24.

757. See *supra* text accompanying notes 200–202 (stating that *Isbell* and *Williams* were the first to confess and incriminate others); *supra* text accompanying note 253 (noting that *Williams* gave eight statements to law enforcement).

758. Conversation with Commission Executive Director Smith and Associate Director Stellato (Nov. 13, 2015), *supra* note 24; e-mail by Robert P. Mosteller to Sharon Stellato, *supra* note 750; e-mail response by Stellato, *supra* note 24.

precise concerns it reflects are not clearly identified. However, in light of the track record of the Commission in operation, some of the likely concerns have been answered. First, thanks to DNA advances, we see in the Commission's cases that demonstrably innocent individuals do plead guilty. Second, the availability of the Commission procedure under the unanimity rule for those who pled guilty has shown no indication that guilty-plea claimants would overwhelm the system or find an easy path to exoneration. However the *Isbell*, *Mills*, and *Williams* cases are explained, they certainly suggest that commissioners will view a claim of innocence after a guilty plea with at least appropriate skepticism. Modifying the voting requirement to a simple majority with the requirement of adequate explanation of the claimant's decision to plead guilty,⁷⁵⁹ or, failing that, a super majority rather than unanimity should be considered.

How damaging is the unanimity requirement? If the legislative design is judged by the inconsistent resolution before the Commission of the five claimants in the Bowman homicide, the unanimity rule appears questionable and potentially quite harmful. However, another feature of the legislation helped to produce a satisfactory result in the end. *Isbell*, *Mills*, and *Williams* were exonerated through post-conviction motions filed by their lawyers relying in substantial part on the evidence developed by the Commission. However, this exoneration occurred only after a newly elected prosecutor re-evaluated the case. Thus, unanimity and the role of a prosecutor resistant to admitting error are perhaps both flaws.

Fortunately, the overall legislative design allowed an alternative method for adjudicating the evidence of innocence. This case demonstrates the importance of the statute's explicit provision that submission of a claim to the Commission does not prejudice consideration of the claim through a post-conviction motion. The Commission's role as a neutral, expert, and empowered investigative agency in combination with the availability of an alternative avenue for relief does not fully cure, but certainly helps ameliorate, those two potential inadequacies in design.

3. Effective and Efficient Screening of Innocence Claims

One element of the process that this Article only briefly examines is the screening of the enormous number of innocence

759. The District of Columbia statute discussed in Part I, *see supra* text accompanying notes 56–61, permits review of guilty plea cases. That statute requires the defendant to explain why they should be entitled to review despite their guilty plea, but it does not impose a higher standard of proof. *See* D.C. CODE § 22-4135(g)(1)(E) (2015).

claims presented to the Commission and its determination to move forward with only a tiny fraction of those claims. The cases chosen for review are an impressive group, but that conclusion does not reveal whether others should also have been the subject of formal inquiry.

Substantial public information is available regarding the cases that reached formal inquiry. Little information is available on those where the Commission dismissed the claim after informal screening or preliminary investigation. Whether more transparency can or should be brought to this part of the process,⁷⁶⁰ whether additional resources can or should be enlisted to aid the initial review process,⁷⁶¹ and whether more information should be provided to defense counsel and prosecutors about the status of investigations⁷⁶² are questions worthy of further examination, but are outside the scope of this Article. This Article has paved the way for future scholars who may wish to develop further research on this particular topic.

CONCLUSION

This Article has examined the work of the Commission over its first decade of operation. The features set out in its authorizing statute produced, as intended, a state agency with neutrality, investigative power, accumulated expertise, and growing acceptance. The model works and has resulted in significant accomplishments in the seven cases that culminated in exonerations.

The Commission's important work and what it demonstrates about North Carolina's real commitment to rectifying wrongful convictions should be appreciated. Further, the Commission should be given renewed support. The full Commission process, which benefits from the staff's investigation and carries the legitimacy and stakeholders' involvement of the Commission hearing and three-judge panel adjudicatory process, is impressive and other jurisdictions

760. See Wolitz, *supra* note 15, at 1077–79 (discussing the great responsibility given to the Commission staff to make decisions regarding summary dismissals and the lack of transparency or oversight).

761. See Maiatico, *supra* note 17, at 1359 (noting a recommendation to involve law school innocence projects in this initial screening process).

762. See generally Christine Mumma, Powerpoint presentation by Christine Mumma to the Joint Legislative Oversight Committee on IDS/Innocence Inquiry Commission: Innocence Agencies and Reform in North Carolina (Jan. 26, 2016) (making this recommendation and a recommendation to reduce case backlog by limiting applications to cases involving homicide, sex offenses, and robbery and other felonies only when referred by counsel) (on file with the *North Carolina Law Review*). A large number of Mumma's recommendations were enacted by the legislature in 2016. See Act of June 30, 2016, ch. 73, sec. 1, § 15A-1460 (2016), <http://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2015-2016/SL2016-73.pdf> [<https://perma.cc/GP5S-Y669>].

should take note of this model. Alternatively, at the investigative level, the Commission's inquisitorial model, with its access to law enforcement files and evidence and testing capacity can unearth and validate claims of factual innocence. Without these tools, these wrongful convictions may have eluded correction by advocates operating through the ordinary adversary process. Those investigative strengths were demonstrated in the *Brown & McCollum* and *McInnis* cases, which were resolved in state post-conviction proceedings rather than through the "adjudicatory" element of the Commission process.

No doubt the North Carolina Innocence Inquiry Commission model can be improved.⁷⁶³ Other jurisdictions should take the Commission's strengths and build on them, adapting the model to accommodate local differences and eliminating aspects proven to be problematic. The key message is this—a state agency devoted to finding innocence can work in the real world if it has a commitment to neutrality and is perceived as such. With a demonstrated commitment to neutrality, broad investigative authority, and adequate resources, inquisitorial innocence commissions can add real value to the criminal justice process by finding wrongful convictions that eluded exposure through the adversarial model.

⁷⁶³ See *supra* note 762 and accompanying text for the changes made by the North Carolina legislature in 2016.